130-341

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 210.

R. G. BROCK AND G. T. McKENZIE, COPARTNERS AS R. G. BROCK & COMPANY, PLAINTIFFS IN ERROR,

vs.

THE NORTHWESTERN FUEL COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

FILED DECEMBER 17, 1885.

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INDEX.

	Original.	Print.
Citation	1	1
Proof of service of citation	1½	1
Writ of error	2	1
Caption	3	2
Petition at law	4	2
Exhibit A—Agreement between The What Cheer Land and Coal Co. and R. G. Brock & Co., July 13, 1881	7	3
Exhibit B—Assignment of contract by The What Cheer Land and Coal Co. to The Northwestern Fuel Co., ——, ——	12	6
Exhibit C—Account of R. G. Brock & Co. with The North Western Fuel Co., Dec. 1, 1881	13	6
Summons	16	7
Marshal's return	17	8
Answer and counter claim	18	9
Motion for more specific statement	22	11
Reply to answer	23	11
Rejoinder	26	13
Amended and substituted reply	27	13
Reply to amendments to answer	31	15
Amendments to answer and counter-claim	31	15
Amendment to answer and counter-claim	33	16
Minutes of trial	35	17

JUDD & DETWEILER, PRINTERS, WASHINGTON, FEBRUARY 23, 1889.

	Original.	Print.
Verdict	37	18
Judgment	38	18
Bill of exceptions	39	19
Testimony of Samuel Gilfoy	40	19
E. I. Foster	43	21
R. G. Brock	44	22
I. B. Grant	51	25
E. N. Saunders	60	31
L. H. Jackson	77	40
Samuel Gilfoy (recalled)	78	40
Objections to deposition, &c.	92	47
Stipulation as to deposition	93	48
Notice to take deposition	94	48
Deposition of George A. Goodell	95	49
Testimony of E. N. Saunders (recalled)	144	72
Samuel Gilfoy (recalled)	146	73
R. G. Brock (recalled)	147	74
E. J. Foster	170	85
J. A. Vincent	180	91
H. A. Foster	185	93
E. N. Saunders (recalled)	187	94
R. G. Brock (recalled)	194	98
Def'ts' Exhibit A—Letter of Gilfoy to Brock & Co., Nov. 30, 1881	197	100
B— " Foster " " Dec. 3, 1881	198	100
C— " " " " Dec. 5, 1881	198	100
D^1—Agreement between The What Cheer Land and Coal Co., and R. G. Brock & Co., July 13, 1881, and assignment of same	199	101
D^2—Letter of Brock & Co. to Foster, Dec. 5, 1881	204	103
E— " " " " Dec. 15, 1881	204	103
F— " " " " Gilfoy, —— —, ——	205	103
G— " " " " Nov. 17, ——	206	104
H— " " " " —— —, ——	207	104
I— " " " " Nov. 22, ——	207	105
K— " " " " Nov. 23, ——	208	105
L— " " " " Nov. 26, ——	208	105
M— " " " " Nov. 28, ——	209	106
N— " " " " Nov. 30, ——	209	106
O— " " " " Dec. 1, ——	210	106
Pl'ff's Exhibit P—Letter of Saunders to Brock & Co., Dec. 17, 1881	210	106
Q—Letter Brock & Co. to Saunders, Dec. 19, 1881	211	107
Defendants' requests for instructions	212	107
Charge to jury	214	108
Clerk's certificate	223	112

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Northwestern Fuel Company:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the district of Iowa, wherein R. G. Brock and G. T. McKenzie, copartners, are plaintiffs in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable O. P. Shiras, U. S. district judge, northern district of Iowa, this 6th day of February, 1885.

[Seal Circuit Court U. S., Northern District of Iowa, Dubuque.]

O. P. SHIRAS, *Judge.*

1½ Service of the within citation accepted at Dubuque, Feb'y 6, 1885.

THE NORTHWESTERN FUEL CO.,
By HENDERSON, HURD & DANIELS, *Att'ys.*

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the northern district of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The Northwestern Fuel Company, plaintiff, and R. G. Brock and G. T. McKenzie, copartners, as defendants, a manifest error hath happened, to the great damage of the said R. G. Brock and G. T. McKenzie, copartners, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the

Supreme Court of the United States, this 6th day of February, A. D. 1885.

[Seal Circuit Court U. S., Northern District of Iowa, Dubuque.]

A. J. VAN DUZEN,
Clerk U. S. C. C., Dist. of Iowa.

Allowed.
O. P. SHIRAS, *Judge.*

3 NORTHERN DISTRICT OF IOWA, *ss:*

Pleas before the circuit court of the United States for the northern district of Iowa, eastern division, at a term began and holden in the city of Dubuque on the third Tuesday of April, A. D. 1883, before the Honorable Oliver P. Shiras, judge of the United States district court for said district.

THE NORTHWESTERN FUEL COMPANY
vs.
R. G. BROCK and G. T. MCKENZIE. } No. 66. Law.

Be it remembered that heretofore, to wit, on the 18th day of February, A. D. 1882, a petition was filed in the office of the clerk of the United States circuit court for the northern district of Iowa, eastern division, in the words and figures following, to wit:

4 In the Circuit Court of the United States in and for the District of Iowa, Northern Division. April Term, 1882.

NORTHWESTERN FUEL COMPANY
vs.
R. G. BROCK, G. T. MCKENZIE, of the Firm of R. G. Brock & Co.

Petition at Law.

And now comes plaintiff and for cause states—

That they are a corporation duly organized under the laws of the State of Minnesota, and deal generally in all kinds of fuel and mining coal, and has its principal place of business in Saint Paul, in State of Minnesota.

That defendants, R. G. Brock & Co., is a copartnership residing and doing business in Cedar Rapids, in the State of Iowa, the individual names of said copartnership being R. G. Brock and G. T. McKenzie, both of whom are citizens of the State of Iowa.

That on the 13th day of July, 1881, said defendants made and entered into a written contract with the What Cheer Land and Coal Company, the same being a corporation doing business in the State of Iowa; which contract is in words and figures as shown by Exhibit "A," hereto attached and made a part hereof.

5 That the benefits of said contract were duly assigned to the Northwestern Fuel Company, this plaintiff, by said What Cheer Land and Coal Company, in words and figures as seen by Exhibit "B," hereto attached and made a part hereof.

That said contract provides that after the month of September, 1881, said defendants shall pay for all lump coal furnished them the sum of 75c. per ton over and above the cost paid by the company to the miner, not including entry work, which amount thus paid, up to and including the month of November, 1881, was one dollar per ton.

That said contract also provides that defendant- shall pay the sum of one & $\frac{25}{100}$ dollars per ton for nut coal furnished them thereunder.

That by virtue of said contract plaintiff furnished defendant- and they received under said contract from said plaintiff coal, lump and nut, of what the annexed Exhibit C, which is made a part hereof, is a correct statement as to dates, amounts, prices, and totals, and in every particular.

That under said contract payment for said coal is to be made each month, the coal furnished during each month to be furnished during the month, to be paid for in cash at the office of the coal company on or before the 15th day of the month following.

That the said assignment was made with the knowledge and consent of defendants.

6 That demand by this plaintiff was duly made since the 15th day of December, 1881, and they failed and refused to pay.

That there is due this plaintiff under said contract the sum of thirteen hundred nine and $\frac{50}{100}$ dollars after giving them credit for all moneys paid and all other credits they are entitled to and for all just offsets.

Wherefore plaintiff asks judgment in the sum of thirteen hundred nine $\frac{50}{100}$ dollars, with interest and costs of suit, against said firm and the individual members thereof.

D. W. BRUCKART,
Att'y for Plaintiffs.

STATE OF IOWA, }
Linn County, } *ss:*

I, —— ——, being duly sworn, depose and say that I am agent for said plaintiff, and as such agent did the business upon which the above claim is founded, and personally know, having read the foregoing petition, that the facts therein set forth are true, as I believe.

C. J. FOSTER, *Agent.*

Subscribed and sworn to before me the 6th day of February, 1882, by said E. J. Foster.

[L. S.] J. C. STODDARD,
Clerk Superior Court, C. Rapids, Iowa.

7 EXHIBIT A.

This agreement, made the 13th day of July, 1881, at Cedar Rapids, Iowa, between the What Cheer Land and Coal Company, party of the first part, and Mess. R. G. Brock & Co., of Cedar Rapids, as second parties, witnesseth:

That, subject to the conditions following, the first party hereby agrees to furnish and deliver to said second parties all the lump coal mined by said coal company at their mine now in operation at What Cheer, Iowa, for the period commencing with the present date and ending July 1, 1882, said coal and all coal herein agreed to be furnished to be loaded at the mines and delivered to said second parties at said mine upon cars to be furnished by second parties. Said coal company hereby also agrees to furnish in said manner and at said place to said second parties so much of the nut and slack coal as they shall mine during said period as said second parties shall order, all said coal to be weighed on the truck scales of said company at the mines, which weight shall in all cases be binding, except when shortage is certified by the station agent at the point of delivery of said coal by said second parties or by other reasonable and proper evidence.

Said coal company agrees to make all reasonable endeavor to increase the productive capacity of their mine to at least twenty cars per day at the earliest practical date, but the company
8 shall not be responsible to said second parties for damages for their failure so to do or to operate said mine (or to maintain said mine at said capacity) resulting from any inability to obtain laborers, or from strikes among miners, or by reason of accident or other cause beyond the control of said company. It is understood by said second parties that there is now existing between the said coal company and the Burlington, Cedar Rapids and Northern Railway Company a contract for the furnishing of coal to said railway company. It is also understood that said coal company has agreed to furnish to parties at Iowa City all the coal needed for local trade at Iowa City.

The contract made hereby is understood to be subject to said Burlington, Cedar Rapids and Northern — Company and to the right and privilege of said coal company to furnish to the local trade at Iowa City all the coal needed or required by said trade (not to exceed three cars per day till the mine produces fifteen cars per day).

And it is further agreed that when the product of said mine shall have reached the amount of twenty-two cars per day said coal company may, if it should so desire, sell to such customers as it may secure at any point not exceeding two cars per day of lump coal (without the consent of said second parties), but so as not to interfere with customers already secured by second parties; and
9 inasmuch as the agreement of said second parties hereinafter entered into does not require them to take the entire product of nut and slack coal produced at said mine it is understood and agreed that said coal company is at full liberty to secure a market for said nut and slack coal, and that said second parties shall have a right to demand of the first party the balance only remaining unsold of said quantities of coal and so as not to interfere with contracts existing prior to notice by said second parties of their need of all the product remaining unsold after such notice, but said first party may not (except at Iowa City) furnish said coals at a less price than

here agreed without reducing rates to said second parties to such reduced prices.

The second parties agree to take of and from said coal company, subject to the reservations and limitations above, all the lump coal mined by said company during said period and so much of the nut and slack coal as they can find sale for, said coal to be delivered to them on the cars at What Cheer, Iowa, in manner aforesaid; and they agree to pay therefor the following rates, to wit: During the months of April, May, June, July, August, and September, for lump coal, sixty-two and one-half cents (62½) per ton above the cost of mining said coal, to wit, the cost paid by said company to the miner, not including entry work, and during the remaining
10 months of the year seventy-five cents per ton of two thousand pounds above the cost of mining.

They agree to pay for all the nut coal taken by them the sum of one dollar and twenty-five cents ($1.25) per ton and for slack coal the sum of three dollars per car of twelve tons during said entire period; but the prices here made as to nut and slack are made with the following understanding and agreement, to wit: If the prices obtainable by said second parties for said classes of coal last named will enable them to make a reasonable profit on the same by payments to said coal company of four dollars ($4.00) per car of twelve tons for slack and one dollar and thirty-five cents ($1.35) per ton for nut coal during the six months commencing October 1st next, then they agree to pay said company such advance. They agree to buy of said company all the nut and slack coal their trade demands up to the capacity of said mine to furnish the same, and they especially agree with said company that they will use their best efforts in securing sale of said classes of coal.

Payments for said coal are to be made each month, the coal furnished during the month to be paid for in cash, at the office of the treasurer of the coal Co., on or before the 15th day of the month following, and a failure so to pay may, at the option of the first party, terminate the contract on five days' written notice.

11 It is agreed that second parties shall not be liable to the first party by reason of their inability to furnish transportation for coal during periods of snow blockade or strikes on railways, or resulting from accidents, nor by reason of their inability to secure cars upon which to load coal.

It is hereby mutually agreed between said parties that they will each use their best exertions to secure the cars necessary for their use in handling the coal under this contract.

In witness whereof we sign our names hereto this 21st day of July, 1881.

THE WHAT CHEER LAND AND COAL CO.,
By L. H. JACKSON, *Sec'y.*
R. G. BROCK & CO.

By consent of the parties hereto the supply of lump coal to be furnished to R. G. Brock & Co. for the remainder of the term of this contract is limited to 12 cars per day.

Nov. 7, 1881.

R. G. BROCK & CO.

12 EXHIBIT B.

The benefits of this contract on future shipments assigned to the Northwestern Fuel Co.

[L. S.] THE WHAT CHEER LAND AND COAL CO.,
By S. L. DOWS, *Pres.*
LOUIS H. JANBORN, *Sec'y.*

13 EXHIBIT C.

CEDAR RAPIDS, *Dec'r* 1, 1881.

Messrs. R. G. Brock & Co. to Northwestern Fuel Company.

Date.	Car No.	Weight.		Price at mines.	
1881.					
Nov. 1	54	28,000	Lump	$1 75	24 50
	3510	28,	"		24 50
	123	24,	Nut	1 25	15 "
	628	28,	Lump	1 75	24 50
2	1264	28,	"		24 50
	4156	28,	"		24 50
	1730	28,	"		24 50
	5890	28,	"		24 50
	4052	28,	"		24 50
	1436	28,	"		24 50
	1274	28,	"		24 50
	4282	28,	"		24 50
	13823	24,	Nut	1 25	15 50
	4244	28,	Lump	1 75	24 50
3	3292	28,	"		24 50
4	6566	28,	"		24 50
	7322	28,	"		24 50
5	12658	28,	"		24 50
7	9848	28,	"		24 50
	9584	28,	"		24 50
	7416	28,	"		24 50
	15762	28,	"		24 50
	19246	28,	"		24 50
8	7194	28,	"		24 50
	9190	28,	"		24 50
	3464	28,	"		24 50
14	15686		Lump	1 75	24 50
	19282	28,	"	"	24 50
	10786	28,	"	"	24 50
	8748	28,	"	"	24 50
	12198	28,	"	"	24 50
Nov. 8	17736		"	"	24 50
	10696		"	"	24 50

Exhibit C—Continued.

Date.	Car No.	Weight.		Price at mines.	
1881.					
Nov. 8	209	24,000	Nut	$1 25	15 50
9	221	24,	"	1 25	15 "
10	3540		Lump	1 75	24 50
	11554		"	"	24 50
	7756		"	"	24 50
	15640		"	"	24 50
	9470		"	"	24 50
	9558		"	"	24 50
	14826		"	"	24 50
12	13		"	"	24 50
	123		"	"	24 50
14	2586		"	"	24 50
	5474		"	"	24 50
	8920		"	"	24 50
	9784		"	"	24 50
15	3682		"	"	24 50
	8900		"	"	24 50
16	975		"	"	24 50
18	12		"	"	24 50
21	3156		"	"	24 50
	4248		"	"	24 50
29	116		"	"	24 50
					1,309 50

15 And which said petition was endorsed as follows, to wit:

No. 66. Northwestern Fuel Company *vs.* R. G. Brock & G. T. McKenzie. Petition at law. Filed Feb'y 13, 1882. H. K. Love, clerk U. S. circuit court, district of Iowa, northern division. D. W. Bruckart, Hurd & Daniels.

And afterwards there was filed in the office of the clerk a summons in words and figures following, to wit:

16 *Summons, U. S. C. C.*

UNITED STATES OF AMERICA, *District of Iowa, — Division,* } *ss:*

To the marshal of the district of Iowa:

In the name of the President of the United States you are hereby commanded to summon R. G. Brock and G. T. McKenzie, of the firm of R. G. Brock & Co., a citizen of the State of Iowa, to appear before the honorable circuit court of the United States in and for the district of Iowa, on the first day of the next term thereof, to be begun and holden at the city of Dubuque on the 3rd Tuesday of April next, it being the 18th day of April, A. D. 1882, then and there to answer unto The Northwestern Fuel Company, a citizen of

the State of —, in a plea of assumpsit, to the damage of said plaintiff in the sum of thirteen hundred and nine $\frac{50}{100}$ dollars, interest & costs of suit.

Hereof fail not, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Dubuque, this the 13th day of February, A. D. 1882, and of the Independence of the United States the 106.

[L. S.]

H. K. LOVE,
Clerk U. S. C. C., Northern District of Iowa,
By ALFRED HOBBS, *Deputy.*

17 [Endorsed:] No. 66. Original summons. Circuit court of the United States, northern district of Iowa. Northwestern Fuel Company *vs.* R. G. Brock & G. T. McKenzie. Filed this 3 day of March, 1883. H. K. Love, clerk. D. W. Bruckart, Independence; Hurd & Daniels—residence, Dubuque—attorneys for plaintiff.

This writ came into my hands for service on the 13th day of February, A. D. 1882, and I served the same on the within-named R. G. Brock — G. T. McKenzie on the 17th day of February, 1882, by reading the same to each of them, by delivering a true copy to each of them personally at Cedar Rapids, in the county of Linn and State of Iowa.

J. W. CHAPMAN,
U. S. Marshal,
By T. M. HOPKINS,
Spec. Deputy.

Marshal's fees:

Mileage, 85 miles	$5 10
Service on 2	4
Copy, 2	2
	$11 10

DISTRICT OF IOWA, *ss:*

T. M. Hopkins, of Dubuque, is hereby appointed special deputy U. S. marshal to serve this writ.

J. W. CHAPMAN,
U. S. Marshal for the Northern District of Iowa,
By GEO. C. HEBERLING, *Deputy.*

18 And afterwards, to wit, on the 18th day of April, A. D. 1882, there was filed in said court an answer and cross-bill in the following words and figures, to wit:

In the Circuit Court of the United States, District of Iowa, Northern Division.

NORTHWESTERN FUEL COMPANY
vs.
R. G. BROCK — G. T. MCKENZIE, of the Firm of R. G. Brock & Co.

For answer to plaintiff's petition herein defendants state—

I.

They deny that there is due the plaintiff herein the sum claimed in and by said petition or any other sum after giving these defendants credit for all they are entitled to for all just offsets.

II.

For cause of action against the plaintiff defendant- states that on the 21st day of July, 1881, these defendants entered into the written contract with the What Cheer Land & Coal Company, a copy of which is annexed to plaintiff's petition and marked Exhibit A, to which reference is hereby had; that after the making of said contract, and on the 7th day of November, 1881, it was in writing modified by agreement of the parties to said contract, as shown by said Exhibit A, attached to plaintiff's petition, which modi-
19 fication was in words and figures as follows:

"By consent of the parties hereto the supply of lump coal to be furnished to R. G. Brock & Co. for the remainder of the term of this contract is limited to 12 cars per day.

"November 7, 1881.

"R. G. BROCK & CO."

Which modification was endorsed upon the duplicate of said contract held by the What Cheer Land & Coal Co. and accepted by said company; by means whereof these defendants became and were entitled to receive on said contract from said What Cheer Land and Coal Co. twelve cars of lump coal per day during the remainder of the term of said contract—that is, from November 7, 1881, up to and ending on the 1st day of July, 1882; that after the modification of said contract as aforesaid the said contract was, on the 7th day of November, 1881, duly assigned to the plaintiff herein, and said plaintiff accepted said contract and became bound by all the conditions therein contained; that on the date said contract was assigned to plaintiff as aforesaid the plaintiff herein leased from the What Cheer Land & Coal Co. for a period greater than the unexpired term of said contract all of its mines and other property from and by which said lump coal was furnished and to be furnished to defendants by said What Cheer Land and Coal Co. and in and by said lease, which was in writing, it was provided in writing as follows:

It is understood and agreed that certain contracts for the sale of coal have been made by the said party of the first part, "meaning thereby the What Cheer Land and Coal Co.," a list of which, with the prices at which such coal is sold, is to be furnished to the said party of the second part, "meaning thereby the plaintiff herein, who assumes the obligations thereof and to whom the benefits are assigned." Said written lease is in the possession of the plaintiff, and defendants are unable to annex a copy thereof to this answer.

Defendants aver that at the time said lease was made, entered into, and accepted by the plaintiff the plaintiff received from the What Cheer Land and Coal Co. a list of parties with whom that corporation had made contracts for the sale of coal, and in that list appeared the name of R. G. Brock & Co., and that at the same time plaintiff received from said What Cheer Land and Coal Co. the original contract, a copy of which is annexed to its petition as Exhibit A, and, by reason of the premises, became and was fully bound to carry out all of the provisions of said contract as modified.

These defendants aver that on their part they kept and performed all the agreements and provisions in said contract contained, and that after plaintiff received said contract and became bound thereby these defendants furnished a sufficient number of cars at the mine named in said contract to receive and ship twelve carloads of lump coal as provided by said contract as modified; that the plaintiff, upon its part, made no effort to secure cars to ship said coal, and from and after the 29th day of November, 1881, neglected and refused to ship or deliver to defendants any coal whatever, and on the 3rd day of December, 1881, the plaintiff repudiated said contract and declined and refused to furnish defendants with any more coal whatever under the terms of said contract; that said contract was and is of great value to these defendants, and by reason of plaintiff's violation thereof these defendants have been greatly damaged in the sum of, to wit, twenty thousand dollars.

Wherefore these defendants demand judgment against the plaintiff for the sum of twenty thousand dollars, less the amount due from defendants to plaintiff, as set forth in its said petition, together with interest and costs.

HUBBARD, CLARK & DAWLEY,
Attorneys for Def't.

UNITED STATES OF AMERICA, }
District of Iowa, Linn County, } *ss:*

I, R. G. Brock, being duly sworn, depose and say that I am one of the defendants in the above-entitled action. I have heard the foregoing answer read and know the contents thereof, and the statements therein contained are true, as I verily believe.

R. G. BROCK.

Subscribed and sworn to before me this 17th day of April, A. D. 1882.

[L. S.]

H. RICHEL,
Notary Public.

And which said answer and cross-bill is endorsed as follows: United States circuit court. Northwestern Fuel Co. *vs.* R. G. Brock & Co. Answer and cross-bill. Filed April 18, 1882. H. K. Love, clerk U. S. circuit c't.

And afterwards, to wit, on the 19th day of April, A. D. 1882, there was filed in said court a motion for more specific statement in the words and figures following to wit:

In Circuit Court of the United States, District of Iowa, Northern Division.

NORTHWESTERN FUEL COMPANY *vs.* R. G. BROCK & Co. *et al.* } Motion for More Specific Statement.

Plaintiff moves that defendants be required to make their answer and cross-bill herein more specific, in this: Said answer and cross-bill states "that said contract was and is of great value to these defendants, and by reason of plaintiff's violation thereof these de-
23 fendants have been greatly damaged in the sum of, to wit, twenty thousand dollars."

Plaintiff moves that defendants be required to state of what and wherein such damage consists and when the same and the items thereof accrued, and be required to set out an itemized and specific statement of such damage, giving dates when each item accrued.

D. W. BRUCKART,
HURD & DANIELS,
Attorneys for Plaintiff.

Which said motion is endorsed as follows: No. 66. U. S. cir. c't. Northwestern Fuel Co. *vs.* R. G. Brock *et al.* Motion for more specific statement. Filed April 19, 1882. H. K. Love, clerk, by Alfred Hobbs, dep'y. D. W. Bruckart, Hurd & Daniels.

And afterwards, to wit, on the 24 day of November, 1882, a reply to the answer was filed in the following words and figures, to wit:

In Circuit Court of the United States, Northern District of Iowa, Eastern Division.

THE NORTHWESTERN FUEL CO. *vs.* R. G. BROCK *et al.*, Defen'ts. } Reply.

For reply to the answer and counter-claim of defendants, filed in above cause, plaintiff says:

24 It admits the execution of the written contract, Exhibit A, and its modifications on Nov. 7, 1881, as set out in said answer; also the assignment thereof to plaintiff, as alleged; admits that it leased from the What Cheer Land and Coal Co. its mines,

&c., as alleged, and that it was provided in writing in said lease as stated in said answer; admits that it received the list of persons with whom contracts for the sale of coal had been made, as stated in said answer; denies that the defendants furnished a sufficient number of cars at the mine named in said contract to receive and ship 12 car-loads of lump coal, or so furnished any number of cars, except such only as plaintiff filled for defendants; and plaintiff further avers that at all the times named in said answer and during the continuance of said contract it delivered to defendants at the times and place named in said contract and in accordance with its terms as many car-loads of coal as said defendants furnished cars at said mine to receive the same in, and filled with lump coal for defendants all the cars they furnished at said mine to receive coal; deny that defendants are damaged by plaintiff's breach of contract to the amount of twenty thousand dollars or in any less sum.

2nd. For further reply plaintiffs says that during the time from November 1, 1881, to July 1, 1882, there were at said What Cheer a number of coal mines, owned & operated by various parties,
25 producing large quantities of coal for shipment in cars over and by the B., C. R. & N. R'y, the only line of railway and only means by which any coal produced or mined in any of said mines could during that time have been shipped; that said railway was not able to and did not during any of said time ship or carry out from said What Cheer to exceed 60 cars of coal per day and less than 60 per cent. of the coal the owners and operators of said mines sought and desired to ship from said What Cheer by said railway and could and would have mined for that purpose had they been able to get transportation therefor; that said railway not being able to furnish transportation during any of said time for all the coal produced at said mines and the capacity thereof, the said What Cheer mine was only entitled to and could and did have during said time, for the purpose of shipping out and transporting its coal product and loading coal thereon, the number of about 13 cars per day; that of this number of 13 cars per day the said B., C. R. & N. R'y was entitled to, under the contract named in said Exhibit A, and demanded and received of plaintiff and from said What Cheer mine during all said time about 7 cars per day and the parties at Iowa City named in said Exhibit A the number of about 3 cars per day, and it would have been and was impossible during any of said time from December 1, 1881, to July 1, 1882, for said Brock
26 & Co. or plaintiff for them to have secured over from 2 to 3 cars per day for loading coal at said mine during any of said time; and plaintiff denys each and every allegation of said answer and counter-claim not herein expressly admitted.

HENDERSON, HURD & DANIELS,
Attorneys for Plaintiff.

Which said reply is endorsed as follows: No. 66. N. W. Fuel Co. *vs.* Brock *et al.* Reply. Filed Nov'r 24, 1882. A. J. Van Duzee, clerk, &c.

And afterwards, to wit, on the 25th day of November, 1882, there was filed in said court a rejoinder in the following words and figures, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Eastern Division.

NORTHWESTERN FUEL CO. *vs.* R. G. BROCK *et al.* } Rejoinder.

For a rejoinder to the 2nd division of plaintiff's reply, defendants state—

I.

That on the 3rd day of Dec., 1882, plaintiff, without cause, repudiated the contract set out in the petition and answer herein, and absolutely refused to deliver defendants more coal
27 thereunder, without any claim or pretense that cars could not be procured, and thus and thereby deprived defendants of all opportunity to secure cars for the transportation of said coal; by means whereof plaintiff is estopped from claiming or pretending that cars could not be procured after the date aforesaid.

II.

That plaintiff owned and operated all the mines at What Cheer after Nov. 7, 1881, and purposely diverted cars from the What Cheer mine from that date to Dec'r 3, 1881, and from and after said last date plaintiff made no effort to secure cars to transport said coal.

Wherefore defendants pray judgment.

HUBBARD, CLARK & DAWLEY,
Att'ys for Defen'ts.

Which said rejoinder is endorsed as follows: N. W. Fuel Co. *v.* Brock *et al.* Rejoinder. Filed Nov'r 25, 1882. A. J. Van Duzee, clerk U. S. cir. c't.

And afterwards, to wit, on the 16 day of April, 1883, there was filed in said court an amended and substituted reply in the words and figures following, to wit:

In the Circuit Court of the United States, Eastern Division of the Northern District of Iowa. April Term, 1883.

THE NORTHWESTERN FUEL CO., Plaintiff, *v.* R. G. BROCK & G. T. MCKENZIE, Copartners Brock & Co., Defendants. } Amended and Substituted Reply.

28 For an amended and substituted reply to the answer and counter-claim of defendants filed in the above cause, leave of

the court being first had, the plaintiff files the following reply and states:

It admits the execution of the written contract, Exhibit A, and its modification on Nove'r 7, 1881, as stated and represented in said answer. It admits that it leased from the What Cheer Land & Coal Co. its mines, &c., as alleged in the answer, and that it was provided in writing in said lease, as therein stated; admits that it received the list of persons named in the answer.

Plaintiff denies that the defendants furnished a sufficient number of cars at the mine named in said contract, as required to do by the terms of said contract, to receive twelve (12) car-loads of lump coal per day or so furnished any cars whatever, except such only as plaintiff at all times promptly filled for defendants and shipped them or their order.

Plaintiff denies each and every statement and allegation in said answer and counter-claim made or contained and not herein affirmatively admitted; denies that it ever at any time repudiated the contract, Exhibit A, and denies that it ever at any time neglected or refused to ship or deliver to defendants any of the coal they were entitled to receive under said contract; but, on the contrary,
29 plaintiff avers that during the entire time named in said answer and during the entire time of the continuance of said contract it delivered to defendants, at the times and places named in said contract for the delivery of the same and in accordance with the terms of said contract, as many car-loads of coal as defendants furnished cars at said mine to receive the same in, and on its part kept and performed all the agreements and provisions in said contract contained and to be kept by them performed. Plaintiff denies that defendants were ever damaged by its breach of said contract in the sum of twenty thousand dollars or in any less sum.

For further reply plaintiff says that it is provided in said contract that a failure by defendants to pay on the 15th day of each month for the entire amount of coal delivered during the preceeding month shall authorize said plaintiff, as assignee of said first party named in said contract, to terminate said contract on five days' written notice. Plaintiff avers that on December 15th, 1882, there became due to it for coal furnished defendants in the month of November, A. D. 1882, under said contract the sum of thirteen hundred and nine & $\frac{50}{100}$ dollars; that defendants neglected and refused to pay the same or any part thereof to plaintiff, although requested by plaintiff so to do, and thereupon, on December 17, A. D.
30 1882, plaintiff, as authorized by said contract and provided therein, terminated the same, and defendants were not entitled to any coal thereunder after December 22, A. D. 1882, when the same became terminated at the expiration of five days after the service of the notice required by said contract to terminate it, which service was made on December 17, 1882; that prior to said December 22, A. D. 1882, plaintiff furnished and delivered to defendants all the coal that they furnished cars to receive, and in all respects complied with the terms of said contract.

Wherefore plaintiff prays that it have judgment as asked in its petition herein filed, and for costs.

HENDERSON, HURD & DANIELS AND
BLAKE & HORMEL, *Pl'ff's Attorneys.*

STATE OF MINNESOTA, } ss:
Ramsey County, }

E. N. Saunders, being sworn, says he is an officer, to wit, president, of plaintiff in the above-entitled cause of action; that he knows the contents of the foregoing reply, and that the statements therein made are true.

E. N. SAUNDERS.

Sworn to and subscribed before me and in my presence by the said E. N. Saunders this 16 day of March, A. D. 1883.

[L. S.] C. D. O'BRIEN,
Notary Public in and for said Ramsey County, Minnesota.

31 And afterwards, to wit, on the 19th day of April, A. D. 1883, there was filed in said court a reply to amendment to answer in the following words and figures, to wit:

Reply to Amendment to Answer.

N. W. FUEL CO. *vs.* BROCK.

Plaintiff, for reply to the said amendment, denies each and every allegation thereof.

II.

And, for a further reply, plaintiff repeats each of the allegations of plaintiff's reply to the answer as may apply to the statements of said amendment; denies that defendants have been damaged in the sum of twenty thousand dollars or in any less sum.

BLAKE & HORMEL,
HENDERSON, HURD & DANIELS,
Attorneys for Pl'ff.

Which said reply was endorsed as follows:
Filed April 19, 1883. Alfred Hobbs, dep. clerk U. S. cir. c't.

And afterwards, to wit, on the 21st day of April, A. D. 1883, there was filed in said court an amendment to defendant's answer and counter-claim in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Eastern Division.

32 THE NORTHWESTERN FUEL CO. *vs.* R. G. BROCK *et al.*

By leave of court the defendants amend their answer and counter-claim and state that by the terms of the contract referred to in said

answer and cross-claim these defendants are entitled to receive from the plaintiff all the nut coal produced by said What Cheer mine which the trade of these defendants might demand; that the product of nut coal from said mine while operated by the plaintiff was two car-loads per day; that these defendants desired to take said nut coal under said contract and their trade demanded such nut coal; that these defendants demanded of the plaintiff said nut coal during the month of November, 1881, and until plaintiff repudiated said contract and refused to further perform the same; that these defendants furnished a sufficient number of cars to receive said nut coal; that the plaintiff upon its part made no effort to secure cars or to ship said coal and refused to ship said coal ordered by defendants during the month of November, 1881; that these defendants were, after plaintiff repudiated said contract and utterly refused to fulfill the same, ready and willing to take said nut coal and may [make] payment therefor, and required the same for their trade,
33 and were wrongfully deprived of the same by the wrongful repudiation of said contract on the part of the plaintiff, as set forth in the original answer and counter-claim; that they were at all times ready to furnish transportation and receive said nut coal and pay for the same in accordance with said contract, and by means of the refusal of plaintiff to furnish said nut coal, together with the breaches of said contract set forth in defendants' original answer and counter-claim, they have been damaged in the sum claimed therein, viz., $20,000, for which they demand judgment as in their original answer.

HUBBARD, CLARK & DAWLEY,
Attorneys for Def'ts.

Which said amendment to answer and counter-claim is endorsed as follows:

U. S. circuit court. N. W. Fuel Co. *vs.* R. G. Brock. Amendment to answer & counter-claim. Filed 21 day of April, A. D. 1883. Alfred Hobbs, deputy clerk.

And afterwards, to wit, on the 21st day of April, A. D. 1883, there was filed in said court an amendment to answer in the words and figures following, to wit:

In the Circuit Court of the United States, Northern District of Iowa, Eastern Division.

THE NORTHWESTERN FUEL CO. *vs.* R. G. BROCK *et al.*, Def't-.

34 The defendant, by leave of court, amends his answer heretofore filed herein and states:

He admits that the amount claimed by the plaintiff for coal delivered to him during the month of November, 1881, is correct and just, and that said coal was so delivered to him as set forth in said petition.

HUBBARD, CLARK & DAWLEY,
Att'ys for Defen'ts.

Which said amendment to answer is endorsed as follows: U. S. circuit court. N. W. Fuel Co. *vs.* R. G. Brock. Amendment to answer & counter-claim. Filed 21 day of April, 1883. Alfred Hobbs, deputy clerk.

35 In the Circuit Court of the United States, Northern District of Iowa, Eastern Division. April Term, 1883.

FRIDAY, 20*th day of April, A. D.* 1883.

Fourth day.

Honorable Oliver P. Shiras presiding.

NORTHWESTERN FUEL COMPANY *vs.* R. G. BROCK and G. T. MCKENZIE. } No. 66. Law.

It is ordered by the court that the original rejoinder in this cause stand good as rejoinder to amended reply and leave given to file amendment to answer, which is done.

Thereupon the cause coming on to be heard, Henderson, Hurd & Daniels & —— O'Brien, Esq., appearing for said plaintiff and the said defendant by Hubbard, Clark and Dawley, their attorneys—

Thereupon came a jury of twelve good and lawful men, citizens of the district, Gustavus Horn, Geo. Stahle, J. B. Meyers, Sr., Charles B. Campbell, Jacob Kleespie, Lucius Lane, J. M. Roberts, W. H. Lyman, John Marquis, R. R. Plane, R. Meuth, and L. Larson, who were duly empanneled, tried, and sworn well and truly to
36 try the issue joined and a true verdict to give according to the law and the evidence.

The hearing of the testimony occupied the attention of the court up to the hour of adjournment.

SATURDAY, 21*st day of April, A. D.* 1883.

Fifth day.

Court met pursuant to adjournment.

NORTHWESTERN FUEL COMPANY *vs.* R. G. BROCK and G. T. MCKENZIE. } No. 66. Law.

This cause again coming on to be heard, the jury and counsel being all present, the hearing of the testimony was not concluded at the hour of adjournment.

37 MONDAY, 23*d day of April, A. D.* 1883.

Sixth day.

Court met pursuant to adjournment.

NORTHWESTERN FUEL COMPANY
vs.
R. G. BROCK and G. T. MCKENZIE. } No. 66. Law.

This cause again coming on to be heard, the jury and counsel being all present and the evidence and arguments of counsel having been heard, the cause was submitted to the jury by the court, and the jury retired to consider their verdict. After due deliberation they returned into court and delivered the following verdict, to wit:

We, the jury, find for the plaintiff in the sum of fourteen hundred and two $\frac{47}{100}$ dollars ($1,402.47) *dollars.*

J. M. ROBERTS, *Foreman.*

The defendant thereupon gave notice and filed his motion for a new trial, which the court takes under advisement.

38 FRIDAY, 15*th day of June, A. D.* 1883.

Fifty-first day.

Court met pursuant to adjournment.

NORTHWESTERN FUEL COMPANY
vs.
R. G. BROCK and G. T. MCKENZIE. } No. 66. Law.

In above cause the motion for a new trial filed by the defendant having been submitted to the court is duly considered & by the court overruled.

And thereupon, plaintiff moving for judgment upon the verdict of the jury—

It is considered, ordered, and adjudged that the Northwestern Fuel Company, the plaintiff herein, have and recover judgment against R. G. Brock and G. T. McKenzie, defendants herein, for the sum of fourteen hundred and two $\frac{47}{100}$ dollars ($1,402.47), with interest, at six per cent. per annum, from April 23, 1883, and costs of suit, taxed at $——, and that execution issue therefor.

It is further ordered that defendant have sixty days from this date to prepare and have signed a bill of exceptions herein.

39 In the Circuit Court of the United States, Northern District of Iowa, Eastern Division.

NORTHWESTERN FUEL CO. *vs.* R. G. BROCK *et al.*

Bill of Exceptions.

Be it remembered that on the 20th day of April, 1883, this cause came on for hearing before the court and a jury, duly selected, empaneled, and sworn, when the following proceedings were had:

The defendants, to maintain their cause of action upon their counter-claim, introduced and made offers of the following testimony and saved exceptions to the rulings of the court upon the introduction of offers of testimony, as hereinafter set forth.

40 United States Circuit Court, Northern District of Iowa, Eastern Division.

NORTHWESTERN FUEL CO. *vs.* R. G. BROCK & CO.

Transcript of Testimony.

DUBUQUE, *April 20th*, 1883.

SAMUEL GILFOY, sworn on the part of the defendant, testified as follows:

Q. Where do you reside, Mr. Gilfoy?
A. What Cheer, Iowa.
Q. What is your occupation?
A. I am superintendent of a coal mine.
Q. What coal mine?
A. Coal mines belonging to the Star Coal Company at present.
Q. What is your relation to the Northwestern Fuel Co.?
A. I have no relations with them at present.
Q. In Nov., 1881, were you at What Cheer?
A. Yes, sir.
Q. In what capacity were you acting then?
A. Superintendent of coal mines for the Northwestern Fuel Co.
Q. What mine?
A. Mine known as shaft C, or the What Cheer Land & Coal Co. mine.
Q. That is the mine they took from the What Cheer Coal Co.?
A. Yes, sir.

41 Q. Up to what time did you continue to be superintendent of that mine for the Northwestern Fuel Co.?

A. I could not say. I commenced for them November 7th, 1881, and I was in their employ for some three or four months.
Q. You were in their employ, then, as superintendent of the mine on the 30th of November, 1881?
A. Yes, sir.

Q. And was running that mine for the Northwestern Fuel Co. at that time?

A. Yes, sir.

Q. As general superintendent?

A. Yes, sir.

Q. Will you look at that letter and see if you sent it on the 30th day of November, 1881, to Brock & Co.?

A. I did.

Letter marked Def'ts' Exhibit A, and a copy thereof is hereto annexed, marked Def'ts' Exhibit A.

Q. Are you acquainted with the handwriting and signature of E. I. Foster?

A. Yes, sir.

Q. Do you know him?

A. Yes; I do.

Q. How long have you known him?

A. Well, perhaps, for 15 or 16 years.

Q. In what capacity was he acting for the Northwestern Fuel Co. on the 30th of Nov., 1881, the date of this letter?

A. I could not tell you.

Q. You know his handwriting, do you?

A. I think I do.

Q. See if this is his signature.

A. I should say it was, sir.

Letter here marked Exhibit B, and a copy thereof is hereto annexed, marked Defendant-' Exhibit B.

42 Q. Will you see if that is his signature? (Handing witness letter.)

A. I should say it was, sir; yes, sir.

Q. Were you acting for the Northwestern Fuel Co. in writing this letter of Nov. 30th, to which you- attention has been called?

A. I was.

Q. Under whose directions did you write Brock & Co., as shown by the last part of your letter?

Objected to as immaterial; objection overruled.

A. Well, sir, I was acting under Mr. Foster's directions.

Q. Mr. Foster's directions?

A. Yes, sir.

Q. Had you talked with Mr. Saunders prior to writing that letter? Mr. Saunders was president of the fuel Co.?

A. He was.

Q. Had you talked with him prior to writing that letter in regard to Brock's orders for coal?

A. Well, yes, sir.

Q. What did he tell you to do with them?

A. He told me to fill them; fill all the orders Brock sent there if he sent the cars to put it in.

Q. What did he tell you about getting cars yourself?

A. Didn't tell me anything about getting cars myself.
Q. Did he tell you to refer Mr. Brock's order for coal to Mr. Foster?
A. No, sir.
Q. Did he, after the last of November, tell you that your action in referring Mr. Brock's orders for coal to Foster was all right?
43 A. No, sir; he did not say anything to me about it.

Witness stands aside.

E. I. FOSTER sworn for defendant-:

Q. Where do you live?
A. Cedar Rapids, Iowa.
Q. What is your business?
A. I am in the coal business.
Q. Are you connected with the Northwestern Fuel Co.?
A. No, sir.
Q. Were you in Dec., 1881?
A. Yes, sir.
Q. Will you look at this letter which the reporter has marked Exhibit B, dated December 3rd, 1881, and state if you wrote it.
A. I did; yes.
Q. Now look at the letter marked Exhibit "C," dated December 5th, and state if you wrote that.
A. (Witness reads letter.) Yes, sir; I did.

(A copy of said letter is hereto annexed, marked "Defendants' Exhibit C.")

Q. Do you know Mr. Saunders, president of the Northwestern Fuel Co.?
A. Yes, sir.
Q. How long have you known him?
A. I think in the neighborhood of five years.
Q. Were you acquainted with him at the date of this letter of December 5th?
A. Yes, sir; I was.
Q. Did you see him between December 3rd & December 5th?
A. I do not remember.
Q. Well, won't you refresh your memory by looking at that letter again?

(Witness reads letter.)

Q. Well, what do you say?
44 A. I say what I said before, in refreshing my memory, I do not think I did see him personally.
Q. Did you see him just prior or about the time of writing this letter?
A. He was down a short time before that. I saw him a short time before that. I could not state the exact date.
Q. Not long before this letter was written?

A. Not very long. He was down the latter part of Nov., I think.

Q. Now, at the time you saw him did you consult with him in regard to Brock's coal contract, and did he leave the adjustment of that matter entirely with you?

A. Only as to loading the cars that Brock might send.

Q. What instructions, if any, did he give you in regard to furnishing cars?

A. He gave me none. Well, I might modify that a little. He told me to be sure and see that all the cars Brock sent there were loaded and billed as he directed.

Witness dismissed.

R. G. BROCK sworn and examined for defendant:

Q. Where do you reside?

A. Cedar Rapids, Ia.

Q. How long have you lived there?

A. I think it is 27 years since I first came there.

Q. What is your business?

A. Fuel, principally.

Q. Does that include coal?

A. Yes, sir; I also handle lime and some other articles. Fuel is the principal thing.

Q. How long have you been in that business?

45 A. I think it is ten years last September since I entered that business.

Q. You were in that business in Cedar Rapids, then, in the year 1881?

A. Yes, sir.

Q. Are you one of the defendants in this case and a member of the firm R. G. Brock & Co.?

A. I am.

It is here admitted that the contract, a copy of which is attached to the petition, is in evidence (a copy thereof is hereto annexed, marked Defendants' Exhibit D No. 1).

Q. You were a party to this contract in evidence between the What Cheer Coal Company & R. G. Brock & Co., were you not?

A. Yes, sir.

Q. When did you last receive coal under that contract?

A. Well, I cannot state from memory. We did not receive anything of any amount after the 9th of November. I think that was about the last. We might have received now & then a car for a week or so.

Q. Did you receive any coal after the 3rd day of December, 1881?

A. No, sir.

Q. Will you look at those letters which have been introduced and marked Exhibits A, B, & C and see if they were received by you about the times they were dated?

A. Yes, sir; I received those letters about the different dates.

Letters marked A, B, & C are here offered in evidence.

Objected to as irrelevant and immaterial and no foundation laid for their introduction and not identified as the letters of the plaintiff; objection overruled.

Letters marked A, B, & C are here read to the jury. A
46 letter dated Dec. 5th, R. G. Brock & Co. to E. I. Foster, here marked Exhibit D. (A copy of said letter is herewith annexed, marked Defendants' Exhibit D 2.)

Q. Look at this letter, Mr. Brock, dated Dec. 5th, 1881, and state, if you know, who wrote it.

A. I wrote it.

Q. Who did you send it to?

A. E. I. Foster.

Exhibit D here offered in evidence and read to the jury.

Q. Now, I had read a letter here written by Mr. Foster to your company on that date; state whether or not this letter of Mr. Foster's, dated Dec. 5th, 1881, was an answer to your letter which I have last read.

A. That is my understanding.

Q. You received this letter from Foster, dated Dec. 5th, then, after you wrote your letter of that date?

A. Yes, sir.

Q. Being the letter last read?

A. Yes, sir.

Q. Did you write any other letter to Foster on that day relative to coal transactions?

A. I think not.

Q. Do you recollect of receiving from any source a statement of the amount due the Northwestern Fuel Company for coal furnished you under this contract during the month of November, 1881?

A. Yes, sir.

Q. Who did — receive it from?

Objected to as immaterial.

Q. Is the statement you now hold in your hand the one that you received?

A. Well, this one that I received—I think, I received a detailed statement previous to getting this.

47 Q. I will ask you if you recollect who you received that detailed statement from?

A. I received it through the mail.

Q. From whom? Was there any letter with it?

A. I think there was, but I would not be positive upon that point. I think there was a letter requesting payment.

Q. Did you afterwards talk with Mr. Foster and learn from him whether or not he sent it to you?

Objected to as leading; objection sustained.

Q. Well, did you have a conversation with Foster, and what, if anything, did he say to you as to where that statement came from?

A. No, sir; I do not think I ever did.

Q. Did you preserve the envelope in which you received this statement?

A. No, sir; I did not.

Q. What company, if any, did it purport to come from? Did it have any card on it?

A. Star Coal Company. It had their card.

It is here admitted that Mr. Foster had authority to act for the company in writing these letters.

Q. I will ask you if, after receiving this statement for November coal, whether you wrote the letter I now show you to Mr. Foster and sent it to him.

A. Yes, sir.

Letter is here marked Exhibit E and offered in evidence.

Objected to as immaterial; objection sustained.

A copy of said letter is hereto annexed, marked Defendants' Exhibit E.

48 Q. Mr. Brock, after you received Foster's letter of December 3rd, which has been read in evidence here, did you have a personal interview with him in regard to your coal contract?

A. I think not, particularly. I had one previous. I do not remember of any after that.

Q. How long before December 3rd?

A. I should think it was about the 15th to the 20th of November—about the 20th, as near as I can recollect.

Q. What did the conversation relate to?

A. Related to their furnishing coal on the contract.

Q. What did he say in regard to it?

A. Said they had just received a copy of the contract.

Q. What was the conversation?

A. I think I asked him why he was not furnishing us coal. He made the answer something like this: "Because they did not wish to do it." After we had talked a few minutes he gave as a reason for not wishing to do it, when I questioned him very closely, that he could make more money to place his coal somewhere else, and he proposed to do it; that he did not propose to put his hands in the pockets of the Northwestern Fuel Company and give it to us when he could make more money out of it in other directions. That was about the 20th of November. Up until about the 16th of November, until we received a semi-monthly statement, we had supposed that our orders were being filled, but when we received a semi-monthly statement we discovered then that there had been no coal shipped after the Northwestern Fuel Co. had really taken
49 possession of those mines, and then I went to Mr. Foster's office, understanding that he was acting for the Fuel Co.

Q. What did he say in relation to having seen your contract or a copy of it?

A. Well, he said the contract was not good for anything.

Q. Did he say he had seen it or a copy of it?

A. I think he did. I think he said he had a copy of it.

Q. What complaints, if any, did Mr. Foster make to you at that time in relation to the transportation business?

A. I do not think he made any.

Objected to; objection overruled.

Q. After this conversation with Mr. Foster do you recollect how much coal you received, if any?

A. Very little, if any. I cannot tell from memory that we received any after that.

Q. Mr. Gilfoy speaks in his letter of Nov. 30th of I. C. car 116, 28 thousand pounds having been forwarded to you by mistake; do you recollect whether you received that car—that is, it was consigned to one of your customers?

A. I think it was. I do not understand where his mistake came in.

Q. Aside from that one car, have you any recollection of receiving any coal after your connection with Foster that you have detailed?

A. No, sir; I do not think we received any after that. It was very hard to determine exactly whether we did or didn't, as shipments sometimes are made and notice of their shipments is not received for some time after shipment, and it is very difficult
50 to determine just exactly what time certain shipments were made.

Q. How did the coal received by you during the month of Nov. compare with that received in October—was it more or less?

Objected to as immaterial; objection sustained.

Q. Was there at any time prior to Dec. 3rd any complaint made to you by any person representing the Northwestern Fuel Company, in regard to insufficiency of transportation to supply you with the 12 cars of coal that you were entitled to under the contract?

A. I do not remember that that was ever brought up between myself and any party until after that date. It might have been spoken of in connection with other things and it might not.

Q. What step did you take in regard to securing transportation prior to Dec. 3rd?

Objected to; no ruling.

Noon adjournment.

Defendant offers in evidence letters written by Brock & Co. between Nov. 16 & Dec. 1st, marked Exhibits F, G, H, I, K, L, M, N, & O.

Objected to as immaterial and irrelevant; objection overruled.

Copies of said letters are hereto annexed, marked Defendants' Exhibits F, G, H, I, K, L, M, N, & O, respectively.

51 I. B. GRANT sworn and examined on behalf of defendant:

Q. Where do you reside?

A. What Cheer, Iowa.

Q. What was your occupation in 1881?

A. I was agent for the B, C. R. & N. Railway at What Cheer.

Q. Up to what time did you continue to be their agent?
A. Up to Nov., 1882.
Q. When did you commence acting in that capacity?
A. In the spring of 1879 I believe it was.
Q. In November, 1881, was the Northwestern Fuel Co. operating some coal mines at What Cheer?
A. Yes, sir; I think they were.
Q. Do you recollect who superintended the What Cheer mine?
A. Yes, sir.
Q. Who was he?
Ans. Mr. Samuel Gilfoy.
Q. Now, besides Mr. Gilfoy did the Northwestern Fuel Co. have a general superintendent there?
A. No, sir; not that I know of.
Q. Do you know Mr. Foster?
Ans. Yes, sir.
Q. Was he there at any time for the Northwestern Fuel Co.?
A. He was there occasionally. I could not say who he was there for.
Q. I mean Mr. Harry Foster, not E. I.
A. Yes, sir; Mr. Harry Foster was there.
Q. You say he was there?
A. Yes, sir.
Q. Was he there continuously?
A. At that time most of the time he was there.
52 Q. Do you know in what capacity he was acting?
Ans. He was acting as superintendent for the Star Coal Co.
Q. Do you know whether he had general charge of the business of the Northwestern Fuel Co.?
Ans. I do not.
Q. Was the Northwestern Fuel Co. at that time operating the Star mine?
Ans. Not that I know of.
Q. Now, during the month of November, 1881, about what number of cars per day did you have at What Cheer, to be used in the coal business?

Objected to as immaterial and irrelevant; admitted as preliminary.

A. I am unable to state from memory.
Q. Can't you state approximately, sir?
A. I could not state with any degree of accuracy.
Q. How many trains did you run out a day at that time?
A. We ran out a great many more some days than we did others.
Q. Give some days; give something.
Ans. Possibly there were 60 or 70 cars a day. I could not state that for an accurate fact.
Q. But, approximately, you know the number of trains that were running, don't you? I do not mean exactly, but you know what the general business was?

A. The general business was varied so much that it is very difficult for me to state what it might be at any one time.

Q. You remember the fall of 1881, do you?

A. Yes, sir.

Q. That is when the Northwestern Fuel Co. first began operating there, wasn't it?

A. Yes, sir; I believe so.

Q. Did it have in November, 1881, any cars of its own there?

53 A. I could not say.

Q. You don't recollect?

Ans. No, sir.

Q. Now, as to cars that were given to Mr. Harry Foster or to the Star mine to ship the product of the mine, who had charge of those ——

Objected to as immaterial.

Q. What agent of the Star mine had charge and direction of the cars that were used for shipping the product of that mine in November; who were they turned over to by you?

A. To Mr. Harry Foster.

Q. Who were the cars that the product of the What Cheer mine were shipped in?

A. Mr. Gilfoy.

Q. Now, during November to after the Northwestern Fuel Co. commenced operations, then, at What Cheer, did you receive directions from Mr. Gilfoy as to the number of cars needed for the What Cheer mine?

A. Yes, sir.

Q. How did the supply of cars at that time correspond with the demand?

A. It was far below the demand.

Q. Which mine during that time got the most cars, if you recollect?

A. Star A mine.

Q. How many the most; what was the proportion, about?

A. What do you refer to by most?

Q. You say the Star A mine got the most; now, what pro-

54 portion of cars did that mine get as compared with the What Cheer mine, three to one, or two to one, or three out of five in the proportion?

A. Probably two to one; something in that neighborhood.

Cross-examination:

Q. Mr. Grant, you say the supply of cars was far below the demand?

A. Yes, sir.

Q. How many mines were in operation at What Cheer at this time—how many different mines?

A. I believe there were six.

Q. Will you please state how it was that your cars were used in

that way? In the first place, did any cars come there to your care, designated to any particular mine or person?

A. Yes, sir.

Q. In those cases where they came designated for a particular person or a particular mine did they ever come designated for a particular consignee—that is, come there to be loaded and shipped to a particular person at a particular point—cars designated for a particular consignee.

A. They were generally designated for a particular point or for a particular road.

Q. That is what I mean, for some particular point and for a particular road.

A. Yes, sir.

55 Q. In those cases those cars were loaded and you billed them to the points designated, did you?

A. Yes, sir.

Q. In those cases those cars were loaded and you billed them to the points designated, did you?

A. Yes, sir.

Q. Had you any right or authority to change the destination of those cars?

A. No, sir.

Q. You had to send them where they came with orders to be sent?

A. Yes, sir.

Q. For instance, if ten cars came which were ordered to be billed to a point on the Chicago, Milwaukee & St. Paul road you had to send them there—you could not change them?

A. No, sir.

Q. Did any cars come there designated for other railroads as belonging to other railroads—designated for particular railroads—for instance, the Burlington, Cedar Rapids and Northern railroad got its coal there?

A. Yes, sir.

Q. Did they send in their cars for their own coal?

A. Yes, sir.

Q. Had you any right to change those cars from their destination?

A. No, sir.

Q. What were your orders from the railway with reference to Burlington, Cedar Rapids & Northern railway cars? Could you send them off the line of road?

A. No, sir.

56 Q. Suppose the Northwestern Fuel Co., or anybody else, had loaded a train of B., C. R. & N. cars for a point in Minnesota off the line of the B., C. R. & N. road, could you have sent them there?

A. No, sir.

Q. Would you have permitted them to go there?

A. No, sir.

Q. Now, then, as to foreign cars, were there cars belonging to other roads come in there?

A. Yes, sir.

Q. What were your orders in reference to those? Suppose cars from the Illinois Central or the Chicago, Milwaukee & St. Paul or the Chicago, St. Paul, Minneapolis & Omaha railroad came in there, what were your orders with reference to them and what points were you to bill them to?

A. To points on their own roads, with few exceptions.

Q. So if an Omaha car came in there you could not bill except to a point on the Omaha road?

A. No, sir.

Q. If anybody had wanted to bill them to points on another road than the cars belonged to would you have billed them?

A. No, sir.

Q. During the time you were in there did any cars come to your care which were designated as being cars that belonged to or for the use of Brock & Co.?

A. Not that I remember of.

57 Q. If such cars had come there you would have designated them as belonging to them and billed them where they wanted them?

A. Yes, sir.

Q. What was the proportion—what proportion of cars of those cars that came in there were foreign cars and what proportion were cars of the B., C. R. & N. railway? What would be the proportion between foreign cars and domestic cars, speaking of the cars of your road as domestic cars?

A. At that time domestic cars would be a very small proportion of the total amount.

Q. Less of the domestic than foreign cars?

A. Yes, sir.

Q. How many cars a day during that time was the Burlington, Cedar Rapids & Northern taking for its own use?

A. I could not say accurately, because the quantity varied, but I should say 18 or 20 cars.

Q. Then, as I understand you, the cars that came in there belonging to the classes you have named, cars coming in from foreign points or from your own road, designated to be consigned to certain persons, cars from your own road that were not permitted to go off your road, and foreign cars you had to bill to the foreign road from which they came and over which you had no control beyond billing to points on that road?

A. Yes, sir.

Q. You know Mr. Brock, do you?

A. Yes, sir.

Q. Did you see Mr. Brock during that time at What Cheer—in the fall of 1881?

58 A. I may have done so. I have seen him occasionally.

Q. Did Brock, during that time, ever order of you any cars for his use at the What Cheer mines?

A. No, sir.

Q. Did Brock & Co. ever order of you during that time any coal cars for their use at the What Cheer mines?

A. No, sir.

Q. Were you in entire charge of matters there—were you the only railroad agent there handling cars under your general instructions?

A. Yes, sir.

Q. Did you say that neither Mr. Brock or Mess. Brock & Co. ever asked for any cars to be loaded with coal for them during that time?

A. They may have spoken to me in regard to cars, but I accepted orders there only from parties loading cars.

Q. You only accepted orders from parties loading cars?

A. The parties that loaded cars, I accepted orders from them.

Q. That is, the coal companies?

A. Yes, sir; or any other person.

Redirect examination:

Q. When you say you accepted orders only from the parties loading cars, you mean as to the coal cars—the cars loaded with coal. You accepted orders from the officers of the coal companies, I suppose?

A. Well, I meant to have said orders from any parties loading or shipping.

59 Q. As for coal, you accepted orders. Take the Star mine for instance. A car to be loaded at that mine you accepted orders only from the proper officer of that company?

A. Yes, sir.

Q. Ans. so as to the What Cheer mine?

A. Yes, sir.

Q. But as to grain and general shipments, you accepted orders from parties loading that kind of produce?

A. Yes, sir.

Q. Did you have Milwaukee & St. Paul cars right along in November for shipping coal?

A. I could not say without seeing the records.

Q. Well, now, you speak of cars designated for certain persons; do you mean designated on the cars as belonging to certain persons?

A. No, sir; I mean designated either by the superintendent to me or by being billed.

Q. By certain persons?

A. Yes, sir.

Q. When you say the superintendent you mean the superintendent of the B., C. R. & N.?

A. Yes, sir.

Q. If he said to you, "Give so many cars to certain persons," you consider that number designated for that person?

Cross-examination :

Q. Where did the superintendent of the B., C. R. & N. R. R. have his office at that time?

A. Cedar Rapids, Iowa.

60 Q. You say if he gave you orders to furnish any particular shipper with cars you would give them to him?

A. Yes, sir.

Redirect examination :

Q. You received your orders from the superintendent by telegraph?

A. By telegraph or mail or verbally.

Witness dismissed.

E. N. SAUNDERS sworn & examined by defendant :

Q. Where do you reside?

A. At Saint Paul.

Q. Are you president of the Northwestern Fuel Co.?

A. Yes.

Q. How long have you been such?

A. Four or five years.

Q. You were president of that corporation, then, in the fall of 1881?

A. Yes, sir.

Q. Did you have the general control and management of its affairs at that time?

A. Yes, sir.

Q. When did your fuel company first commence operations at What Cheer, Iowa?

A. On or about the 7th of November, 1881.

61 Q. How many mines did your company operate there during the month of November?

A. One.

Q. What mine was that?

A. A mine leased from the What Cheer Land & Coal Co.

Q. How was it with Star mine A?

A. The fuel Co. never had any interest, directly or indirectly, in the Star mine.

Q. What company was operating that mine at that time?

A. The Star Coal Co., I suppose.

Q. What relation did you sustain to that company?

A. Are you questioning me as an individual or on behalf of the fuel comp'y?

Q. I ask you now as an individual.

A. At that time I had none whatever.

Q. What had you on behalf of the Northwestern Fuel Co.?

A. None whatever, more than that there were transactions between the two companies for the purchase and sale of coal; that was the only relation that ever existed between the two companies.

Q. Did you have any contract with the Star Co. in November, 1881, for the product of its mine?

A. The fuel Co. had for the product with certain reservations.

Q. What portion of the product?

A. Well, it was what they could produce over and above what they were required under some railroad contracts and other
62 matters that took precedence over us. They were obliged to take care of the B., C. R. & N. R. R., and people were dependent on the territory of that road; over that we received up to the capacity we furnished cars to load.

Q. Who represented your company, so far as the Star mine was concerned, at What Cheer?

A. I did. We had no local representative at What Cheer.

Q. Were you there yourself, personally?

A. Well, once in a while; not often.

Q. Did Mr. Harry Foster act for you or under your directions?

A. No, sir; at no time. He was, I believe, the president of the Star Coal Co. at this time.

Q. Did you give Mr. Gilfoy instructions as to the number of cars to get for the What Cheer Co.?

A. I do not know as I quite understand your meaning.

Q. During the month of November, 1881, did you give Mr. Gilfoy any instructions as to the number of cars you wanted him to procure to ship the product of the What Cheer mine?

A. I don't know that I did, sir. I think that was out of his province, the procuring of cars. That part of the business I had to regulate myself; had to procure cars from up north and send them down to him, and when they arrived at What Cheer the B., C. R. & N. road would set them in to his mine and he would load them. The matter of procuring cars at all times for our business in
63 that region has been done in the north through cars leased from other parties and sent down by ourselves.

Q. About what number of cars did you have per day during the month of November, 1881, that you procured?

Objected to.

A. I could not state, sir.

Q. Give it approximately, as near as you can.

A. I could not state even approximately, sir; I don't remember.

Q. Have you no recollection?

A. I will explain the reason why I could not explain approximately. I am engaged in directing the movement of cars in a great many directions, and when you come to bind me down to what I was doing at a particular place so long ago I would not undertake to say even approximately.

Q. Did the Northwestern Fuel Co. at that time own any cars of its own for the transportation of coal?

A. The Northwestern Fuel Co. never owned cars of its own; they have cars under leases.

Q. Did you have any at that time?

A. Yes, sir.

Q. How many?

A. Probably from four to six hundred.

Q. Was your company at that time operating any other coal mines except at What Cheer?

A. No, sir; we operated no mines except this one mine.

64 Q. Except the one mine at What Cheer? You had a contract, however, for the product of the Star mine A, with certain reservations, at What Cheer?

A. Yes, sir; we were in the habit of contracting for coal from all sources.

Q. Did you know of this contract with Brock & Co.? I believe you did. You knew it personally at the time the Northwestern Fuel Company leased the What Cheer mine, did you not?

A. Yes, sir.

Q. That contract was consummated on the 7th of November, 1881. How soon after that did you see your superintendent, Mr. Gilfoy?

A. Well, I could not state positively, but I think it was very soon after that I went down to What Cheer. I think it was immediately thereafter—my impression is that it was immediately thereafter—that I went there and engaged Mr. Gilfoy as superintendent and gave him instructions in person for carrying on the business, as far as his duties went.

Q. He had been superintendent of the mine before that time?

A. Yes, sir.

Q. And you continued him?

A. Yes, sir.

Q. Did you give him any instructions in relation to this contract of Brock & Co.?

A. I did, sir.

Q. What instructions did you give him?

A. I unstructed him to load all cars that these parties furnished up to 12 cars a day.

65 Q. What instructions did you give him as to furnishing any cars himself?

A. I do not think I ever gave him any instructions in regard to furnishing cars himself for them or anybody else.

Q. Did you tell him not to make any effort to get cars for them?

A. No, sir.

Q. Did you give him any instructions as to which mine should have the preference in getting cars there at What Cheer, whether he should pitch in and get all he could for the What Cheer mine, and whether he should give way to Mr. Harry Foster?

A. No, sir. I gave him no instructions of any nature in regard to that.

Q. Can you tell which mine you got the most coal of in November, 1881?

A. Yes, sir.

Q. Which one was it—I mean the Star A or the What Cheer mine?

A. The Star A.

Q. How much the most?

A. My impression is that we got little or no coal in November to be of very much consequence. The first month that we operated that mine—the What Cheer mine—it was a sort of a venture on my part to try and increase the quantity of coal.

Q. You mean the product of the mine was small during the first month?

66 A. It didn't amount to much, so far as the shipments to the Fuel Co. was concerned. It was mostly used up by the Burlington road and taking care of Brock and the little trades that were reserved. Mr. Brock got quite a quantity of coal from that mine during the month.

Q. Do you know E. I. Foster, of Cedar Rapids?

A. Yes, sir; I know him.

Q. How long have you been acquainted with him, Mr. Saunders?

A. Four or five years.

Q. Did you give him any directions in November, 1881, in regard to having orders from Brock & Co. for coal in relation to their coming through him?

A. No, sir.

Q. You gave him none?

A. No, sir.

Q. Do you know how it happened that Mr. Gilfoy referred Brock's orders for coal to Foster at Cedar Rapids?

A. I cannot say that I do, sir.

Q. Cannot say?

A. No, sir; I don't know.

Q. Did you learn along about that time that Gilfoy had done that?

A. No, sir; I never was advised of it until after the matters pertaining to this suit were brought before me.

Q. Did you confer with Mr. Foster along the latter part of November or first part of December, 1881, in regard to furnishing Brock any more coal?

67 A. No, sir; I never had any conferences with him on that subject.

Q. Did you give him any instructions in regard to it?

A. No, sir; any instructions that I gave in reference to that mine were given direct to Mr. Gilfoy.

Q. Did you give him any instructions in regard to furnishing coal to Brock?

A. Yes, sir; Mr. Gilfoy I gave instructions to; yes, sir.

Q. Those instructions you have already enumerated, have you?

A. Yes, sir.

Q. Is that all the instructions you gave to either Foster or Mr. Gilfoy?

A. Yes, sir.

Q. Do you know how Foster came to write on the 5th of December that he had conferred with "our president," he said, and his letter of the 3d in regard to furnishing Brock coal was conclusive and final?

A. I don't know how he came to do it; no, sir.

Q. When did you first learn that no coal was being furnished to Mr. Brock?

A. Some time in the first part of December—first or middle of December. I don't remember definitely.

Q. Now, Mr. Saunders, didn't you tell Foster and Gilfoy that that Brock contract was a bad one and that you wanted to get out of it and you didn't want to furnish any coal unless Brock was driven into getting cars?

A. No, sir.

68 Q. Did you tell them in substance or effect that?

A. No, sir; it is the best contract I have ever known being made down there in that region. I would not want to get out of a contract under which we could make more money than anything we ever had.

Q. Do you mean to say that that contract paid you more profit than it did to take coal yourself and sell it?

A. Yes, sir; it would if he furnished cars enough for it.

Q. You could have got cars if you had been a mind to, couldn't you?

A. I don't think I could, sir.

Q. Couldn't you have got cars to furnish Brock 12 car-loads a day at that time if you had tried to?

A. No, sir.

Q. You didn't try, did you?

A. No, sir.

Cross-examination:

Mr. Sanders, just tell the court and jury why that contract of Brock's was a good contract.

A. In mining coal it is very desirable, in order to reduce the expense of mining to the lowest limit, that you should have steady and every-day work, and the great difficulty in the way of that in all Iowa coal-mining enterprises, so far as my knowledge of them

69 goes, is one difficulty of getting cars and transportation every day in the week and the month regularly, so that you can regulate your force of men under ground and on top to the lowest range of expense. Now and then, if you have got a coal mine and want to make any money out of it, I have got to arrange and map out a plan whereby I will have transportation there every day. My expenses are just as much to-day if I should not get any cars as they would have been if I had loaded 20 or 30 cars out of my shaft, and the result is that if I lay still two days and work one I am running behind, and consequently coal miners are anxious to make contracts with parties who will undertake to furnish the cars and have them regularly, and in those instances they may sell at what looks lower than if they undertook to ship them themselves.

Q. If Brock & Co. had furnished this 12 cars per day how was this price they were paying?

A. It was 20 to 25 cents higher than I was buying coal for from other places, at the same time, per ton, under like circumstances of

furnishing transportation. Where I was buying coal of the Star Coal Co. and other mines there and agreed to do what Brock agreed to do with us I was getting cars 20 to 25 cents cheaper than he offered to pay for what he got. He didn't pay for any.

Q. You speak of having 400 to 600 cars leased. Please
70 state to the jury what the character of those leases were.

A. Our business consists of distributing coal over the northwestern part of the Territory of Dakota and into Manitoba and northwestern provinces, and our principal trade was up in that region. We found it was impossible to get cars from the B., C. R. & N. road to move this coal into that region; it took the cars too long to get back. We finally worked up a contract under which we agreed to furnish the cars to run into that Territory and turned them over to the B., C. R. & N. road to be operated by them for us, and we guaranteed to the B., C. R. & N. road a certain fixed tonnage every year, and we could no more take those cars from that traffic and send them off on the local trade for Brock's benefit than we could the B., C. R. & N. cars ourselves. We never had any cars at What Cheer that could have been used for Brock's business under any circumstances. When we assumed this contract we did not contemplate, in the remotest degree, under any circumstances, the furnishing of cars for his use.

Q. What was the minimum quantity which, under your contract with the Burlington, Cedar Rapids & Northern, you were required to ship over their roads to get a rate?

A. One hundred thousand tons.

Q. How long did that contract run?

A. Five years.

71 Q. You say that a part of that contract was you were to furnish cars to them to be used in that trade?

A. Yes, sir.

Q. How many cars?

A. We agreed to have four hundred.

Q. And those cars you had to have built and put into that trade?

A. Or leased.

Q. Built or leased to put into the trade?

A. Yes, sir.

Q. Those belonged to the Burlington, Cedar Rapids & Northern, to be used in that trade?

A. Yes, sir.

Q. And were used until a little accident last month?

A. Yes, sir.

Q. Did Mr. Brock ever, directly or indirectly, to your knowledge, apply to you for a car for the shipment of this coal?

A. No, sir.

Q. In any shape or form?

A. No, sir.

Q. Did you ever have a conference with Brock in relation to this matter?

A. No, sir; not until I went after money to ask him to pay this bill that we are suing him for.

Q. That was the first time you ever heard from him in relation to the matter?

A. Yes, sir.

Q. Did you ever have any arrangement with any railroad or with the Burlington, Cedar Rapids & Northern railroad by which you could control their cars, one way or the other, beyond the extent of your contract?

72 A. No, sir; not beyond that. I had no arrangement by which I could ask them to give me any cars except for through business.

Q. Through business under your other contract?

A. That's all.

Q. And they have made a breach of that other contract and you haven't been able to control that?

A. Yes, sir.

Redirect examination:

Q. Your lease of the cars that you speak of did not bind you not to use them in local trade, did it?

A. Our contract with the B., C. R. & N.?

Q. I want to know about your lease. You got control of the cars by leasing them?

A. Yes, sir.

Q. Didn't you get absolute control of them to use as you saw fit during the term of the lease?

A. Yes, sir; we leased them for the purpose of carrying out a contract with the B., C. R. & N.

Q. Was there any condition in the leases that you should use them for that purpose?

A. Yes, sir.

Q. In the lease itself?

A. Yes, sir.

Q. Who did you lease them of?

A. The St. Paul Equipment Company.

Q. And that company required you to use the cars for the contract with the B., C. R. & N.?

A. Yes, sir.

73 Q. The St. Paul Equipment Company?

A. Yes, sir.

Q. What interest did they have in it?

A. That was the bargain.

Q. Did they care what you did with the cars?

A. They had an interest in getting a revenue on the cars.

Q. What?

A. The cars were hired for the specific purpose.

Q. You paid them so much for the cars?

A. We paid them the mileage. The cars would earn more on a long haul. The lease so stipulated. The cars will earn three or four times as much that way as they will to run up and down on local business.

Q. Did you have any other cars leased except from that company?

A. No, sir; not at that time.

Q. Now, I understand you to say that your contract with the Star A Co. was that you would furnish cars?

A. Yes, sir; we would procure cars and send them there for coal.

Q. Was it your desire, then, that the cars which could be procured at What Cheer should be used to take the coal of the Star Co.; was that your general policy?

A. The general policy was that when my cars got to What Cheer they were to be loaded.

Q. I speak of cars which the B., C. R. & N. Co. furnished at What Cheer. What was your policy as to those?

74 A. I don't know as I ever went so far as to map out a policy on those.

Q. Was it your preference that they should be used to haul the coal of the Star A mine rather than the What Cheer?

A. I had no preference in that regard. The coal that I got from the Star A was about as cheap as I could produce the other.

Q. In point of fact were not many cars which were furnished there at What Cheer many more used to haul the product of the Star A mine during November than were used to haul the product of the What Cheer mine?

A. The cars that were furnished by us?

Q. And of the cars furnished there at What Cheer?

A. Well, sir, you ask me to tax my memory a little too much to answer any such question as that. I cannot give you any answer at all. I do not know; too long ago.

Q. Isn't it true you say that this contract with Brock was a good one for you? Isn't it true that when you leased the What Cheer mine you spent two or three days negotiating and trying to get Brock to give up his contract altogether; isn't that the fact?

A. No, sir; I did not spend two or three days.

Q. Didn't you try first to get him to take five car-loads a day?

A. I did not have anything to do with that branch of the negotiations. I never had any negotiations with Brock on the subject. I negotiated with the What Cheer Land & Coal Co. for a lease of their property and closed it all in one day. I had no negotiations with Brock on the subject.

Q. Didn't you make that direct proposition to Mr. Brock and Mr. Dows, who was president of the What Cheer Co., that Brock's contract should be limited to 5 car-loads a day?

75 A. I could not say what the talk was. I only know the fact that I made the lease of the What Cheer Land Co., as appears on that paper, which is a matter of record. I do not remember what was talked that day.

Q. Nor what the negotiations were?

Recross-examination:

Q. Well, Mr. Saunders, if Brock & Co. had furnished you the cars

during this entire time would you have given them the 12 cars of coal per day from the mine at What Cheer?

A. Well, I should if the mine could have furnished it and supplied the obligations which took priority to his contract. I should have been very glad to have done it.

Redirect examination:

Q. I will ask you, Mr. Saunders, how far would those 400 leased cars go towards furnishing the necessary cars to transport the coal that you took from What Cheer station during the month of November?

A. Well, I could not answer that question. I could answer it in a general way.

Q. Well, I knew you could not do anything more than that.

A. I should say generally we never had as many cars as we wanted down there, and always wanted more than we had. I speak now from our wants of coal up above. We never could get enough cars up north there and get them down so we had cars enough.

76 Q. Those 400 cars would not furnish at What Cheer more than three or four cars a day?

A. Oh, yes.

Q. How much?

A. It would depend on the weather a good deal.

Q. How long would it take for the car to make the round trip?

A. Depended on how far north of Saint Paul we sent them.

Q. What would it average up?

A. I could not say; there were all sorts of exigencies in the matter.

Q. You could not give any idea?

A. I haven't any idea. We sent some of those cars 6 or 7 hundred miles north.

Q. Isn't it true that those 400 cars were only a small proportion of the cars that were necessary to use in taking your coal out from What Cheer station?

A. Yes, sir; and they were only a small proportion of the cars we absolutely procured and sent there. We sent foreign railroad company's cars there under contracts with these foreign railroads to supply them with coal—for instance, the Northern Pacific road. We would sell them a- average of 20 cars a day, and engaged with them if they would furnish their own rolling stock and allow them to go to What Cheer I would sell them at a certain price, and also the Manitoba road; but I will say the greater part of all the

77 cars we have had go to What Cheer from the time I commenced taking coal from there have been cars belonging to the Manitoba, Northern Pacific, and Omaha roads, with which we have had arrangements for furnishing cars and allowing them to be brought down to What Cheer and loaded and sent back to them.

Q. Do you suppose that you had one car in November that you had control of and could have done what you wanted to with—just a single one?

A. I don't believe I did.

L. H. JACKSON sworn and examined by defendant:

Q. Where do you reside, Mr. Jackson?
A. At Iowa City, in this State.
Q. What is your occupation?
A. A lawyer.
Q. Were you secretary of the What Cheer Land & Coal Co. in 1881?
A. I was.
Q. Do you recollect what was the product of the What Cheer mine *was* at the time the mine was leased by the Northwestern Fuel Company?

Objected to as immaterial.

COUNSEL FOR DEFENDANT: I expect to show that the Northwestern Fuel Co. immediately began to squeeze prices by having it fall of- as soon as they got it.

Objection sustained.

78 Q. Can you tell, Mr. Jackson, about what number of cars of coal per day the What Cheer Coal Co. furnished to Brock & Co., under the contract in controversy here, during the month of October and up to November 7, 1881?

Objected to as immaterial; sustained.

Witness dismissed.

Mr. SAMUEL GILFOY recalled for def't:

Q. Are you still in the employ of the Northwestern Fuel Co.?
A. No, sir.
Q. Here is a letter marked Exhibit O. Will you look at that pencil mark on the corner? Whose endorsement is that?
A. That is mine.
Q. Whose endorsement is the second one underneath?
A. That is mine also.
Q. When was that endorsement made there—about what time?
A. I have no means of telling that.
Q. Exercise your reason and recollection. Look at the letter and see if you cannot tell.
A. No, sir; I can't tell anything by this what time that endorsement was made.
Q. What is your judgment, from the nature of the endorsement, as to whether it was made about the time you received the letter?
A. I should think it was, sir.

The two endorsements are offered in evidence.
Objected to as immaterial.

79 Q. Who is H. G. P., mentioned in this endorsement?
A. My judgment is that it was H. G. Palmer.
Q. Who was he?

A. He was a clerk at the mine.

Q. Was he in the employ of the Northwestern Fuel Co. at this time?

A. He was.

Q. Who is E. I. F.?

A. E. J. Foster.

Q. Of Cedar Rapids?

A. Yes, sir.

Q. Was this designed as an instruction in relation to shipping the coal that Brock asked for in this letter?

A. Yes, sir.

Q. Now, why did you tell Mr. Palmer to ship the coal if E. I. F. instructed?

Objected to.

The memoranda are admitted in evidence and read as follows:

"H. G. P.: If E. I. F. instructs you to send this coal, send it." "See back of envelope Foster's order countermanding."

WITNESS: I don't think you read that right. That is Fisher's order. Mr. Brock gives an order for a car-load of lump coal for Fisher, and he afterwards countermands the order.

Q. That is what that has reference to? Why did you tell Mr. Palmer to send this coal if Foster instructed him to do it?

80 A. Because Mr. Brock says in the letter that Mr. Foster would do so.

Q. "Did Foster order you to-day to send us some coal here? His head man said he would. Do not fail to get off Barrett's, Mt. Vernon, Iowa, car of coal quick as possible. Their mill is idle for want of it." "Did Foster order you to-day to send us coal here" has no reference to what Brock himself has ordered. He orders cars sent to Dows, Iowa, and Center Point, Iowa, don't he?

A. Yes, sir. I would take that to mean that if Mr. Foster ordered that Mr. Foster agreed to order coal shipped to Mr. C. O. Fisher.

Q. Don't it say he agreed to order some coal "here," meaning Cedar Rapids?

A. Yes, sir.

Q. Now, Mr. Gilfoy, isn't it the fact that prior to this time you had been instructed not to send any coal to Brock & Co. unless Foster authorized it?

A. Yes, sir; I had been instructed not to send any coal to any person.

Q. Unless Foster authorized it?

A. Yes, sir.

Q. You knew of the contract with Brock & Co.?

A. I had heard of it. I do not think I had ever seen it.

Q. Did Mr. Saunders tell you about it?

A. I don't think he did.

Q. What instructions did Mr. Saunders give you in regard to disposing of the product of the What Cheer mine when he took it?

81 A. First, to furnish the railway company with what they needed—that they furnished cars for. After that to furnish Mr. Brock with what coal he needed when he furnished cars for it, and to send some to Iowa City that was agreed upon to be sent there.

Q. How many cars per day during the month of November, 1881, did you get from Grant for the What Cheer mine?

A. I could not answer that question. I do not know.

Q. Do you know anything about it?

A. I know that we got some, but the number—I could not approximate the number.

Q. Was the product of the mine kept up during November?

A. Well, some days the entire output was taken out and some days it was not. We didn't run regularly for the want of cars because we did not have the cars. Some days we would make a full run—full day's work.

Q. What effort did you make to get cars for that mine?

A. I ordered cars daily from Mr. Grant, the agent at the mine.

Q. How many?

A. I could not say how many.

Q. Did you order enough to take the product of the mine?

A. I did.

Q. All that you might have got out?

A. Yes, sir.

Q. Did you have an understanding with Mr. Foster? You know Mr. Harry Foster?

82 A. Yes, sir.

Q. That he was to have the cars there at What Cheer for the Star A mine in preference to your having them for the What Cheer mine?

A. No, sir.

Q. During November, 1881?

A. No, sir.

Q. Had no understanding?

A. No, sir.

Q. Did he get a good many more cars than you did for your mine?

A. Yes, sir.

Q. A good many more?

A. I should say he did.

Q. What was the comparison for November?

A. That I could not say exactly; I think, perhaps, he got 2 or 3 cars to our one.

Q. Did you ever claim to Mr. Grant that he was not assigning cars fairly there in November?

A. No, sir.

Q. Never made any fuss about Mr. Foster getting most all the cars?

A. No, sir; because I believed at the time that he was distributing them fairly between us. I think so yet.

Q. Were you entitled to any B., C. R. & N. cars for your mine when they were there?

A. Yes, sir.

Q. About what number a day?

A. Well, that I could not tell you?

Q. Did you get a good many fewer cars in November than you did in October?

A. Well, my judgment is that we did.

83 Q. How was it with the Star A mine?

A. I think they *got* fewer also.

Q. In proportion as you did?

A. Yes, sir.

Q. About how many cars did you get per day during November?

A. That I could not tell you.

Q. Can't tell anything about it?

A. I can tell we got some, but the number I can't tell.

Q. Can't you tell whether it was one or 15?

A. Well, I could tell that it was more than one, and my judgment is that it was less than 15.

Q. Did you get as many cars the latter part of November as you did the first part?

A. I could not tell that, sir, when I speak of more than one car a day and less than 15. I am speaking now upon the average, taking one day with another; but some days we would get 20 or 25 and other days we would not get any.

Q. During November?

A. Yes; and other months also.

Q. Now, did you know of any reason why you were able to ship on Brock's orders a great many more cars during the first part of November than during the last part if you had been a mind to have shipped as much during the last part?

A. No, sir; but my judgment is we did not get as many cars in the last part as we did in the former part.

84 Q. Well, you got more cars from the 16th to the 31st, didn't you?

A. Well, I presume so; but I could not say certain. There was a time, five or six days, that we did not get any cars.

Q. If you had tried now from the 16th to the 31st, couldn't you have shipped Mr. Brock more than five car-loads of coal in 15 days?

A. I could if I had had the cars.

Q. If you had tried couldn't you have got the cars?

A. I did try.

Q. What did you do with them?

A. The most of them went to the B., C. R. & N. railway.

Q. Now, do you pretend to say that you was not able; that you could not have shipped Brock more coal, if you had been a mind to, during the last part of the half of the month?

A. By letting those other matters go I perhaps could; but I could not say certain.

Q. If you got the same cars?

A. I don't know the number of cars that we did load.

Q. Here is the statement. It shows five cars from and including the 16th up to the 29th, and none after that.

A. Well, sir, if his orders at that time were for points on the B., C. R. & N. railway, I do not believe that I could have got more cars than I did to fill his order.

85 Q. Have you no recollection whether you tried to get more cars?

A. I have.

Q. For Brock?

A. Yes, sir.

Q. During the last part of November?

A. Well, during the latter part of November; yes, sir.

Q. The latter part?

A. Yes, sir.

Q. Now, isn't it a fact that Foster had told you not to send him any more coal?

A. Well, no; not until about the 29th or 30.

Q. Did he tell you then?

A. He told me not to send any more coal to Mr. Brock as long as the railway Co. wanted the coal, unless Mr. Brock furnished the cars.

Q. Did you notify Brock of anything of the kind?

A. I believe I did.

Q. When?

A. I could not state when it was.

Q. Now, in your letter that I have already introduced here you speak of sending Brock a car-load of coal on the 29th, and you say that was sent in your absence and without instructions.

A. Yes, sir.

Q. You mean by that that if you had been there you would not have sent it?

A. Yes, sir; I do.

Q. There was one car that got away from you and went to Brock?

A. Yes, sir.

Q. You didn't mean it should?

86 A. I didn't mean it should.

Q. Mr. Brock, in some of these orders, says "one car lump;" did you understand what that meant?

A. Yes, sir.

Q. What was your understanding of it, as you translated it?

A. One car of lump coal.

Q. Now, as you had transacted business under this contract prior to November, had the practice been for Mr. Brock to designate to you the points to which he wanted cars sent, and you, in shipping his coal, to bill them to that point for him?

A. That was my instructions when I was operating for him.

Q. I didn't ask for your instructions. I asked if that was the course of business between you?

A. Yes, sir.

Q. I suppose it made — difference to you whether you shipped it to Brock, at Cedar Rapids, or to other points.

A. Yes, sir; it made some difference, because we had to have dif-

ferent kind of cars; but, so far as the trade was concerned, it was no difference.

Q. I don't know whether I asked you or not. I will ask you now why did you tell Brock, in your letter of November 30th, that hereafter no shipments of coal will be made except upon orders received from Star Coal Co. through Mr. Foster?

87 A. That is because I had some trouble with Mr. Brock in relation to ordinary cars at What Cheer.

Q. That was it, was it?

A. Yes, sir.

Q. And you assumed to tell him yourself that he must order coal of you through Mr. Foster?

A. No, sir.

Q. How was that?

A. As I understand it, Mr. E. J. Foster was to keep accounts for the Northwestern Fuel Co., and in order to get out of receiving those orders I asked Mr. Foster if he would not take the orders for Brock, at Cedar Rapids, and he said he would.

Q. And so you directed Brock to give his orders through Mr. Foster?

A. Yes, sir.

Q. Did Mr. Foster ever forward any orders to you after that?

A. I think he did.

Q. For coal for Brock?

A. Yes, sir; I think so.

Q. After the 30th of November?

A. No, sir; not after that date.

Q. You never in fact furnished Brock with a pound of coal after that?

A. No, sir; I think not.

Cross-examination:

Q. Did Brock & Co. furnish you with any cars for any of this coal during the months of November and December?

A. I think they did.

88 Q. How many?

A. Five.

Q. Did you load them?

A. I did.

Q. And ship them as directed?

A. Yes, sir.

Q. Did they ever furnish you any more than that?

A. No, sir; not that I knew and was designated to me.

Q. Did you send them all the coal you could get cars for during the month of November?

A. Except for those other contracts.

Q. All the spare cars you could get you let them have?

A. I made that statement to Mr. Brock, I think, at least three times during the month.

Q. Where?

A. From What Cheer. Mr. Brock would intimate by mail that I

could have got more cars for his orders if I would, if I wanted to, and he would say that there were plenty of cars there; he knew there were plenty of cars there, and that I could have got more cars for his use if I would. I would make a statement of all the coal loaded during a certain period—say for 8 or 10 days or from the time I had fixed it up with him before; it might be 5 or 6 or 8 or 10 days between the time. I would make a statement of all the cars and the number *the number* and the initial of the entire amount of cars loaded, and would get the station agent to sign it for me as correct, and I would send it to Brock, so that he could see that
89 I could not have got more cars if I wanted to; that I tried to get more cars; that that was all I could get, and he would come to What Cheer and I would explain to him and show him these statements.

Q. That occurred at least three times?

A. Yes, sir.

Q. Was there any difference between the production of the Star mine and the What Cheer?

A. Yes, sir.

Q. How much more, if any, did the Star mine produce?

A. I think about three times as much.

Q. Will you explain that matter that your attention was called to? You said one I. C. car went to Brock by mistake in your absence. How was that?

A. I was directed about that time—perhaps a day or two, or three, maybe, before that—that unless Mr. Brock should furnish some cars that we could not ship him any more coal.

Q. And that is what you meant by that statement?

A. Yes, sir; and there had been one car sent without my knowledge.

Q. Had Brock furnished it?

A. No, sir; one car that he did not furnish.

Q. You wanted to explain the matter to him in that way?

A. Yes, sir.

Redirect examination:

Q. Was the business of furnishing cars for Brock con-
90 ducted the same prior to the Northwestern Fuel Co. taking the mine that it was afterwards, up to the time that you were instructed not to furnish him any more coal unless he supplied cars?

Objected to as immaterial. No ruling.

A. Yes, sir.

Q. Did you try to get cars for him up to the latter part of November?

A. I did.

Q. And then you quit?

A. Yes, sir.

Q. And Mr. Foster, I believe you say, told you to quit?

A. Yes, sir; he told me that unless he furnished the cars for the coal that we could not ship any more coal.

Q. Did Foster tell you that before you wrote the letter of November 30 or afterwards?

A. Well, I think perhaps it was about that time.

Q. Was it before that letter or afterwards?

A. I should say it was before this letter was written.

Q. Now, that was a radical change in the matter of delivering this coal to Brock, wasn't it?

Objected to as calling for the opinion of the witness. Question withdrawn.

Q. If that was so—if Foster had told you not to try to get any more cars for Brock——

A. I didn't say that.

91 Q. Not to furnish any more coal unless he supplied the cars, why didn't you tell Brock of that change in the business? Why did you simply tell him his orders must come through Foster?

A. I tried to explain that once.

Q. I guess you haven't been asked about that.

A. I said the reason why I told him that his orders must come through Foster was because Foster had agreed to do that part of the business.

Q. That is not my question. Why didn't you tell him that you wouldn't try to get any more cars for him; that he must get his own cars?

A. I didn't think I had any right to tell him that.

Q. Did Foster tell you to keep still about it?

A. No, sir.

Q. But you did—you didn't inform Brock of that change in your purposes? You didn't tell him that you would not try to get any more cars?

A. No, sir; nor I didn't tell anybody else that I would not try to get any more cars.

Q. Well, Foster had told you that you need not?

A. No, sir; he didn't.

Q. Well, he told you to furnish no more coal unless Brock furnished cars, didn't he?

A. Yes, sir.

Witness dismissed.

Defendant offers in evidence a statement prepared by Mr. Foster, the secretary, which it is agreed, as def't understands, shows

92 the cost of mining coal, under the provisions of the contract in controversy, for the months of December, January, February, March and April, May and June.

Plaintiff objects that Foster is not secretary.

Offer recalled.

The defendants read in evidence the deposition of G. A. Goodell, hereto attached and made a part of this bill of exceptions; and on reading of said deposition the following proceedings were had, objections urged, and rulings made by the court:

The first objection in the deposition not insisted on.

Objection to Int. 6 not insisted on.

The third objection in the deposition overruled.

The 21st interrogatory objected to as incompetent, hearsay, and calling for the contents of a written instrument that is in the witness'*es* possession, that in itself being the best evidence of its contents.

Objection overruled.

Subsequent objections up to the 44th interrogatory not insisted on.

Objection to the 44th interrogatory overruled.

Subsequent objections in direct examination not insisted on. The first and second objections in redirect examination not insisted on.

Answer to 17th redirect interrogatory not read.

Answer to 18th redirect interrogatory not read.

93 Subsequent objections not insisted on.

Said deposition is as follows:

In the Circuit Court of the United States, Northern District of Iowa, Eastern Division.

NORTHWESTERN FUEL COMPANY *vs.* R. G. BROCK *et al.*

Stipulation.

It is hereby stipulated and agreed that the depositions on behalf of the defendant herein to be taken, pursuant to the annexed notice, before I. N. Whittam, a notary public within and for Linn county, commencing on the 15th day of November, 1882, at 9 o'clock a. m., may be taken by C. P. Dawley, a short-hand reporter, said witnesses to be sworn by any notary public, their testimony written out by said reporter, read by said witnesses, and sworn to and subscribed before such notary, who shall attach his jurat to each deposition, and when so taken said depositions may be read in evidence on behalf of the defendants with the same force and effect as though taken by said J. N. Whittam, Esq., in pursuance of said notice. Formal caption and certificates to said depositions are hereby waived.

D. W. BRUCKART, *Att'y for P'ff.*
HUBBARD, CLARK & DAWLEY,
Atty's for D'f'ts.

94 United States Circuit Court, Northern District of Iowa, Eastern Division.

THE NORTHWESTERN FUEL COMP'Y *vs.* R. G. BROCK *et al.*

Notice to Take Depositions.

To the above-named plaintiff or to D. W. Burckart and Henderson, Hurd & Daniels, its attorneys:

You are hereby notified that at 9 o'clock a. m. on the 15th day of

November, A. D. 1882, before I. N. Whittam, Esq., a notary public within and for Linn county, at his office, on First avenue, in the city of Cedar Rapids, county and State aforesaid, the defendants in the above-entitled action will take the depositions of the following witnesses, to wit, George Goddell, C. J. Ives, Samuel Gilfoy, and S. L. Dows, the taking of said depositions to be continued from day to day after the above date until the same are completed, and said depositions, when so taken, to be read in evidence on the part of the defendants on the trial of the above-entitled action.

You are requested to appear at the time and place aforesaid and cross-examine said witnesses if you desire to do so.

HUBBARD, CLARK & DAWLEY,
Att'ys for Def't.

95 NORTHERN DISTRICT OF IOWA, *ss:*

I hereby certify and return that I served the written notice on F. B. Daniels, one of the firm of Henderson, Hurd & Daniels, at Dubuque, Iowa, by reading to him the within notice and by delivering to him personally a true copy thereof this 2nd day of November, 1882.

GEO. C. HEBERLING,
U. S Marshal, Nor. Dist. of Iowa.

Service	2 00
Copy	1
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In the United States Circuit Court, Northern District of Iowa, Eastern Division.

THE NORTHWESTERN FUEL COMPANY *vs.* R. G. BROCK *et al.*

Deposition of Geo. A. Goodell.

OFFICE OF HUBBARD, CLARK & DAWLEY,
CEDAR RAPIDS, IOWA, *November* 15, 1882—10 o'clock a. m.

F. C. Hormel, for plaintiff; Chas. A. Clark, for defendant.

GEO. A. GOODELL, being produced, sworn, and examined on behalf of the defendants, pursuant to the annexed notice and stipulation, testified as follows:

96 Int. 1. State your name, age, occupation, and place of residence.

A. My name is George A. Goodell; my age is 27; am train-dispatcher on the B., C. R & N. railroad; residence, Cedar Rapids, Iowa.

Int. 2. How long have you been train-dispatcher of said railway company.

A. Since the 17th of August, 1881.

Int. 3. As such train-dispatcher, what were your duties during the months of November and December, 1881, with reference to ordering cars to various stations on the line of said railway where they were needed for loading to accom-odate the traffic of said company?

A. I had charge of the movements of all cars along the whole line of road during that time—that is, the movement to and from and between the various stations along the line of the road—and also the movement or distribution of such various foreign cars or cars of other roads as we got on the line of the road, either loaded or empty. They were reported to me by telegraph every day, the record of which is kept on these blanks which I have here with me now.

Int. 4. Are you acquainted with R. G. Brock, of the firm of R. G. Brock & Co., of Cedar Rapids, Iowa; and, if so, how long have you known him?

A. I am acquainted with him and have been acquainted with him since November of the year 1879.

Int. 5. Do you know of the said Brock being engaged, during
97 the months of October and November, 1881, in securing coal from the What Cheer coal mine, situated in Keokuk county, Iowa?

A. Of my own personal knowledge, I do not know that. Mr. Brock has said to me——

Plaintiff objects to the witness stating anything that has been told him by Mr. Brock or any other person, unless it was in the presence of the plaintiffs or their representatives or the plaintiff's assignors, as being incompetent and hearsay.

A. Of my own personal knowledge, I do not know that he has been engaged in that business, because I do not know, when the cars are ordered to What Cheer and are loaded there, by whom they are loaded or to whom they are shipped. They are reported to me, as I can show by the blanks here, as those cars are there loaded for certain points or to go to certain places. In all reports that are sent me—all reports that I know anything of—those cars are reported to me as being loaded with coal for Cedar Rapids. The party that they are loaded for or what kind of cars after they are loaded is not reported to me.

Int. 6. Well, do you know of Mr. Brock, during the months mentioned in the last interrogatory, being engaged in ordering or securing cars for coal traffic at said What Cheer coal mine?

Objected to by plaintiff as incompetent and immaterial.

98 A. I know that Mr. Brock has several times been in my office and stated to me that he wanted cars of various kinds at What Cheer to be loaded there with coal.

Int. 7. Did that occur during the months of October and November, 1881?

A. It occurred mostly during the month of November. I could not state positively that it occurred at all during the month of October.

Int. 8. How frequently did it occur during the month of November, 1881?

Objected to by plaintiff as incompetent and immaterial.

A. During the month of November Mr. Brock was in my office—I think it would average three times a week—asking what kind of cars were being sent to What Cheer, asking if there were any cars that could be sent to What Cheer of various kinds.

Int. 9. Was What Cheer at that time a station on the B., C. R. & N. railway; and, if so, on what division or branch?

A. Yes, sir; it was a station on the B., C. R. & N. road, on what we call our Iowa City Division.

Int. 10. Was there any other railway at What Cheer at that time?

A. No. sir.

Int. 11. Where is the station of What Cheer located—on high ground or in a valley?

A. In a valley.

Int. 12. Are there any stations or side tracks in the immediate vicinity of What Cheer used by the railway Co. for the purpose of storing or standing empty cars for the station of What Cheer; and, if so, what stations or side tracks were so used in November, 1881?

99

A. There are several side tracks at Thornburg, a station four miles and a half north and east of What Cheer, that the side tracks at that station were used for storing cars that were to go to What Cheer to be loaded with coal, and also storing the cars that came from What Cheer after being loaded with coal before being brought to Cedar Rapids in the trains.

Int. 13. What kind of ground is that side track situated upon?

A. The side tracks that are used for storing are situated on level grounds.

Int. 14. Is this arrangement rendered necessary for the operation of the road on account of the nature of the ground immediately in the vicinity of What Cheer?

A. At what is called the yards in What Cheer there are but two or three tracks on which we can store cars that are to be loaded with coal, and it is much more convenient to have trains going to What Cheer set out the empty cars that are going to What Cheer to be loaded with coal at Thornburg, after these side tracks that I have spoken of at What Cheer are full, than it is to have them go down into What Cheer and arrange for the switch-engine to place them at various mines. It is more convenient to have the switch-engine go to Thornburg and get them and place them at the various mines than it is to have the train take them and place them there.

100

Int. 15. What means had you, as train-dispatcher, during the month of November, 1881, of knowing what empty cars were on hand at What Cheer and Thornburg side tracks from day to day, and what record, if any, was kept by you during that time in relation to such cars?

A. Every day between two p. m., and as soon after that as we can

conveniently, generally occupying the time pretty well up to 5 and 6 o'clock, there is what we call a telegraphic car report sent in to my office from all stations on the road, and that car report is kept on file there in my office after it is used to distribute the cars from one station to another, and means are taken to supply what other cars are wanted besides the cars that are kept at the stations at the time, and those car reports are kept on file at my office for future reference.

Int. 16. How are the reports made up from day to day—what record do you make of them?

A. The records as they come—as they are put down from the station by telegraph—the original records are filed away themselves as they are put down.

Int. 17. Are they consolidated on any blanks?

A. Not consolidated onto any blanks. The blank that I
101 have with the system of letters designating certain kinds of cars, and there is a key to it that I have in my office and every station on the line has a similar one, and those letters are all that are used in reporting the cars—certain letters for certain cars. The blanks that are kept on file in my office are ruled off with spaces for each one of those letters for a number to be put, with a space at each station for each one of those letters, and that report is filled up, as it comes by telegraph, and the original report as it so comes is used in the distribution of cars, and after we are through with it then the reports are filed away.

Int. 18. Do these blanks which you now have present with you and which you have mentioned contain entries made at the time and showing what cars are reported at the various stations—What Cheer and Thornburg, for instance?

A. Yes, sir; they do.

Int. 19. And these, I understand, you have on file in your office up to the present time under your control?

A. Yes, sir; they have.

Int. 20. Can you, by consulting these blanks, state what number of empty B., C. R. & N. cars and what number of empty C., M. & St. Paul cars were on hand at Thornburg and What Cheer on the 7th day of November, 1881?

A. Yes, sir.

Int. 21. Give the number of those cars so on hand on that day.

102 Plaintiff objects to the question as incompetent, immaterial, and hearsay and calling for the contents of a written instrument which is in witness'*es* possession, that in itself being the best evidence of its contents.

A. On the 7th day of November there were, according to this report, 12 B., C. R. & N. cars at What Cheer and two C., M. & St. P. cars; at Thornburg there were 20 B., C. R. & N. cars and thirteen C., M. & St. P. cars.

Int. 22. What station is next east of Thornburg on that line of your railway?

A. A station called Keswick.

Int. 23. How far is that from What Cheer?

A. 9—7 miles.

Int. 24. What empty cars, if any, were ordered from Keswick to What Cheer on that day?

A. 12 B., C. R. & N. cars, one Chicago, Milwaukee & St. P. car, and three Northern Pacific cars.

Int. 25. What empty B., C. R. & N. cars and empty C., M. & St. P. cars, if any, were on hand at What Cheer and Thornburg, and what empty cars, if any, were ordered from Keswick to What Cheer on the 8th November, 1881?

A. 47 B., C. R. & N. cars, 13 Chicago, Milwaukee & St. Paul cars on hand November 8th at What Cheer and Thornburg. There were four B., C. R. & N. cars and one Chicago, Milwaukee & St. Paul car ordered from Keswick to What Cheer on that date.

Int. 26. Please answer the same question with reference to November 9, 1881.

103 Objected to as incompetent and immaterial and calling for hearsay. It is agreed that this objection shall be taken as applying to each question of the same character without being noted.

A. I supposed I had the full files for that time here, but I find that the sheets from the 9th, 10th, 11th, 12th, and 13th of November are missing.

Int. 27. Please ans-er the same interrogatory, then, with reference to November 14, 1881.

A. November 14 there were 23 B., C. R. & N. cars at What Cheer and Thornburg, 9 Chicago, Milwaukee & Saint Paul cars at Thornburg; there were 10 B., C. R. & N. and one Chicago, Milwaukee & St. Paul car ordered from Keswick to What Cheer on the 14th.

Int. 28. Please answer the same interrogatory with reference to November 15, 1881.

A. November 15, 1881, there were 36 B., C. R. & N. cars at What Cheer and Thornburg and 9 Chicago, Milwaukee & St. Paul's, and there were 9 B., C. R. & N. cars ordered from Keswick to What Cheer and one Chicago, Milwauke & St. Paul. In speaking of cars I refer entirely to empty cars.

Int. 29. Please answer the same interrogatory with reference to November 16, 1881.

A. November 16th there were 35 B., C. R. & N. cars at Thornburg and What Cheer, 17 Chicago, Milwaukee & St. Paul's. There were nine B., C. R. & N. cars ordered from Keswick and one
104 Chicago, Milwaukee & St. Paul ordered from Keswick to What Cheer. On the dates the 15th and 16th and the 14th, on account of a block in the What Cheer yard, those cars from Keswick were not moved into What Cheer; so I find on looking over these reports, and on that account these cars that I have been reporting at Keswick on those days are really the same cars, on account of being blocked—with loaded cars more particularly.

Int. 30. Please answer the same interrogatory with reference to November 17, 1881.

A. On the 17th there were 42 B., C. R. & N. cars at What Cheer and Thornburg and 23 Chicago, Milwaukee & St. Paul. There were no cars at Keswick on that day ordered into What Cheer.

Int. 31. Please answer the same question as to November 18, 1881.

A. On November 18th there were 30 B., C. R. & N. cars at What Cheer and Thornburg and 17 Chicago, Milwaukee & St. Paul's, and no cars ordered from Keswick into What Cheer.

Int. 32. Please answer the same question as to November 21, 1881.

A. November 21 there were 48 B., C. R. & N. cars at What Cheer and Thornburg; 18 Chicago, Milwaukee & St. Paul cars; nothing from Keswick on that day.

Int. 33. Please answer the same question as to November 22, 23, 24, 25, 26, 28, 29, 30th, and December 1st, 2, and 3d, giving the cars for each day separately.

105 A. Nover. 22, 48 B., C. R. & N. cars at What Cheer and Thornburg & 14 Chicago, Milwaukee & St. Paul. There were no cars ordered from Keswick to What Cheer on that day. On the 23rd there were 51 B., C. R. & N. cars at What Cheer and Thornburg; 14 Chicago, Milwaukee & St. Paul; no cars ordered from Keswick on that day. On the 24th there were 20 B., C. R. & N. cars at What Cheer and Thornburg; 14 Chicago, Milwaukee & St. Paul's, and 9 B., C. R. & N. coal cars ordered from Keswick to What Cheer; 9 B., C. R. & N. cars that were ordered from Keswick had been set out there by trains the previous night on account of shortage of room at Thornburg and What Cheer.

On the 25th 10 B., C. R. & N. cars at What Cheer and Thornburg, two Chicago, Milwaukee & St. Paul's, 11 B., C. R. & N. cars ordered from Keswick to What Cheer that day.

On the 26th there were 21 B., C. R. & N. cars at What Cheer and Thornburg, two Chicago, Milwaukee & St. Paul's, one B., C. R. & N. car ordered from Keswick to What Cheer.

On November 28th there were 31 B., C. R. & N. cars at What Cheer and Thornburg, 4 Milwaukee & St. Paul; none ordered from Keswick to What Cheer.

On November 29 there were 46 B., C. R. & N. and three Chicago, Milwaukee & St. Paul cars at What Cheer and Thornburg; none ordered from Keswick on that day.

106 On November 30 there were 62 B., C. R. & N. cars at What Cheer and Thornburg; no Chicago, Milwaukee & St. Paul cars at either place and no cars ordered from Keswick to What Cheer.

On December 1st, 22 B., C. R. & N. cars at What Cheer and Thornburg; no Chicago, Milwaukee & St. Paul; no cars ordered from Keswick to What Cheer.

On December 2nd there were 15 B., C. R. & N. cars and one Chicago, Milwaukee & St. Paul at What Cheer; two cars ordered from Keswick to What Cheer; one Chicago, Milwaukee & St. Paul to What Cheer and none to Keswick.

On December 3d there were 40 B., C. R. & N. cars at Thornburg and What Cheer; one Chicago, Milwaukee & St. Paul; two B., C. R. & N. cars ordered from Keswick to What Cheer.

Int. 34. Please answer the same question as to November 9th, 10, 11, 12, & 13, 19, 20, 27, 1881.

Answer given after noon adjournment.

A. On the 9th day of November there were 30 B., C. R. & N. and 13 Chicago, Milwaukee & St. Paul cars at What Cheer and Thornburg. There were four B., C. R. — and one Milwaukee & St. Paul billed from Keswick to What Cheer on the 9th of November.

On the 10th of November there were 19 B., C. R. & N. cars at Thornburg and What Cheer and 12 Chicago, Milwaukee & St. Paul. There were 9 B., C. R. & N. cars billed from Keswick to What Cheer and one Chicago, Milwaukee & St. Paul.

On the 11th there were 20 B., C. R. & N. cars at Thorn-
107 burg and What Cheer and 7 Chicago, Milwaukee & St. Paul; 9 B., C. R. & N. cars billed from Keswick to What Cheer and one Chicago, Milwaukee & St. Paul.

On the 12th of November there were 38 B., C. R. & N. cars at What Cheer and Thornburg and *and* 9 Chicago, Milwaukee & St. Paul; none billed from Keswick.

On the 19th there were 57 B., C. R. & N. cars at What Cheer and Thornburg and 17 Chicago, Milwaukee & St. Paul; none billed from Keswick.

Int. 35. Please state whether during the dates referred to in your testimony other cars than the B., C. R. & N. and C., M. and St. Paul were sent to What Cheer for coal traffic at that point.

A. Yes, sir; there were.

Int. 36. To what extent?

A. There were probably fifteen—averaged about fifteen cars per day—other kinds of cars sent there.

Int. 37. During the dates you have mentioned were the empty cars at the Thornburg side tracks held there or put there for the purpose of the What Cheer traffic?

A. Yes, sir; they were.

Int. 38. About how many miles of railway has the B., C. R. & N. operated during the time you have been train-dispatcher?

A. When I first took charge as train-dispatcher there was about 580 miles. During the past spring and summer that has been increased to the amount of about 7 hundred miles.

108 Int. 39. State whether or not during all the time you have been train-dispatcher for said railway it has been operated, so far as handling empty cars is concerned, by means of the telegraphic reports to your office already referred to in your testimony.

A. So far as the movement of cars is concerned, yes, sir; it has been operated that way exclusively.

Int. 40. All empty cars?

A. All empty cars; yes, sir.

Int. 41. State whether in your experience as a train-dispatcher you have found this system to be accurate or otherwise.

Objected to as incompetent, immaterial, and calling for the opinion of the witness.

A. During my experience as train-dispatcher on this and also on other roads the system of a daily telegraph car report we have found to be the best means that could be devised for the movement of empty cars—for the handling of empty cars. The system adopted on the B., C. R. & N. road, which has been in use since I have been train-dispatcher, is what we have found to be the most complete system that we could use here, as being adapted to the rather peculiar style of our business, as different from the East and West trunk lines.

Int. 42. Have you found the system to be accurate and reliable or not, as to the operation and distribution of empty cars?

109 Objected to for same reasons as last interrogatory.

A. We have found it to be accurate. I would like to qualify that answer a little. We have found it to be as accurate as any means that could be devised—as any report that could be devised. By way of illustration of the difficulties, we will say that this car report that we speak of now as coming from What Cheer, that car report is made up by the agent at What Cheer, and the agent of every other station in fact, between generally 12 to one o'clock. The car report at that time shows the number of empty cars that are on hand at that station at that time; also the number of empty cars that are need- to be loaded at that station in the next 24 hours. Now, after this time, as is the case at What Cheer, our regular coal train going into What Cheer arrived there in the evening about six o'clock; it was due to arrive there, I think. They would always have a train-load of empty cars for What Cheer to be loaded with coal. Those cars would go in and be placed at the mines, and at least 20 or 30 of them would be loaded and would be taken out the next day on a coal train which left What Cheer at 10 o'clock in the morning. Now, those cars which arrived at What Cheer in the evening and left there at 10 o'clock the next morning loaded would not appear on these reports
110 one way or the other, either as loaded or empty, and that would be the difficulty. That is the difficulty which we find, or one difficulty which we find, in the handling of empty cars. Sometimes the cars go into the station and go out again, being loaded, and they do not appear on our report here. The only thing we can do is to get a reasonably accurate idea of the position of each station, so far as their wants are concerned as to empty cars to be loaded with grain, coal, or whatever freight they wish to load; and we also have slips which are not kept after a certain date on which they are used. They are not kept as a matter of record at all, but we have slips showing what kind of empty cars each train has, and those cars are used to the best judgment of whoever is moving the cars, which I have been doing for the time I speak of. Those cars are left at various stations to fill the requirements of the stations, to be loaded with different merchandise they want to ship—stock, coal, grain, &c.

Int. 43. In the practical operation of the road, then, at What Cheer, as trains ran during the month of November, 1881, were

more or less cars furnished for coal traffic at that station than indicated by your evidence touching the empty cars on hand from day to day?

A. If anything, there were more empty cars furnished.

111 Int. 44. Have you any recollection whether or not, during the month of November, 1881, especially the last half of that month, there was a surplus of freight cars on hand in the operation of your line of railway?

Objected to as incompetent, immaterial, and not pertinent to any issue in the case.

A. During the last half of the month of November there was no particular surplus of cars. From the report there appears to have been but little difficulty in filling the orders for the cars. We appear to have been able to fill the orders for such cars as were wanted, but had no surplus left over after that.

Int. 45. Do you recollect now as a fact that during the last half of that month, owing to wet weather, shipments of grain and cattle fell off?

A. I do not remember it; no, sir; I do not remember the circumstance. There appears to have been but few orders for cars for grain during the time you have mentioned.

Int. 46. During this month of November, 1881, was it your custom and were you in the habit of ordering empty cars to What Cheer and Thornburg from day to day?

A. From day to day; yes, sir.

Int. 47. Were empty cars arriving at those station- from day to day during that month put there in accordance with your orders and directions as train-despatcher?

A. Yes, sir: they were.

112 Int. 48. Who else, if any one, had charge of ordering empty cars to those points during the month of November, 1881?

A. No one but my superior officers on the road.

Int. 49. When your superior officers ordered cars there, if at all, were the orders transmitted through you?

A. Unless it was an exceptional case, they were. An exceptional case which I will mention may be that if one of the officers should be along the line of the road down there and should see a car standing at some station that he knew should go to What Cheer to be loaded, then they would order the train, whatever train they were on, if it was a freight train going towards What Cheer, they would order the conductor of the train to pick that car up and take it on to What Cheer; but it was only in cases of that kind that cars were ordered to What Cheer without the order being transmitted through me.

Int. 50. That, then, was the exception and not the rule?

A. The exception and not the rule; yes, sir.

Int. 51. Do you remember whether or not during the month of November, 1881, your supply of cars was such as to enable you to supply the demand from What Cheer for cars during that month?

Objected to as immaterial, incompetent, and not pertinent to any issue in the case.

A. During most of the time the supply of cars was sufficient.

113 52. Under the custom you have spoken of, of handling and distributing empty cars by you for the various points on your line of railway, suppose the reports from What Cheer and Thornburg were materially wrong or incorrect would that necessarily be detected by you in the operation of your line of road or not?

A. It would not right at the time. In the course of a few days after that it would usually be detected, but right at the time the error was made, any material error at What Cheer, it would not be noticed in this office.

53. Under that system of operating the road and distributing empty cars could material errors occur in the reports to any extent without disarranging your whole plan of operations in the course of a few days?

Objected to as incompetent, calling for the opinion of the witness, and being leading.

A. The only way that that would be detected is that we would discover that there was a great difference in the reports of the last few days from what the business had been before. There is a certain normal state of the business which we expect every day, that would be coming along day after day, a certain amount of cars to be loaded with coal at What Cheer and to be loaded at other points along the line of the road, and any great difference in that for one day

114 might not be noticed, because there might be local causes that would occur at What Cheer or at any other point that would interfere one day with the business at that point; but where it comes for three or four days in a particular section a material difference at that point would be noticed and some inquiry made as to the cause, what was the trouble.

54. Do you know who was superintendent of the What Cheer coal mine during November, 1881?

A. I do not, personally. I never have been at What Cheer and am not familiar with any of the men in charge of the mines there at What Cheer.

55. Was your office connected by telegraph with What Cheer and Thornburg and all stations on the line of your road during November, 1881?

A. Yes, sir; it was with all points in that neighborhood.

56. Did the company have an operator at each station?

A. Yes, sir; they did.

57. And had you an operator in your office?

A. Yes, sir.

Cross-examination:

1. You have spoken about the number of cars that were stationed at What Cheer and Thornburg during the different days of November, 1881; have you any knowledge of the number of cars that were

at those stations during this time, as testified by you, except-
115 ing such information as was communicated by some third person?

A. I have no personal knowledge of the cars that were there. I did not see the cars and was not there at the time. The only information that I have regarding it are the reports we got from those stations on each of those days.

2. I want to ask you if it wasn't a fact that many of the cars that were reported from those stations on different days had perhaps been lying there for three or four days, and even a week, and were being reported constantly, daily—the same cars?

A. That is very liable to be the case. It is my opinion that that was the case at Thornburg a good many times of those days that were reported.

3. Were any of those cars sent to What Cheer and Thornburg sent for any other purpose than coal traffic? Were not many of them sent there for the purpose of removing grain and transporting other freights from those points?

A. No, sir; there were none sent there for that purpose, because we figure that the cars that go into What Cheer loaded with merchandize are sufficient to move all grain. Cars going into What Cheer loaded with merchandize go down to the station proper, ad-
jacent to where the grain-houses are, and cars for coal are
116 handled in bulk—that is to say, a certain number of them—15, 25, or 30 in a string.

4. Were none of these cars that were reported to you from day to day, during the month of November, as lying at What Cheer or Thornburg empty used for any other purpose than transporting coal out of What Cheer?

A. Only in very small quantities. There may have been one or two cars used for transporting something else, but only in very small quantities—not in large quantities.

5. You have stated what cars were reported from there daily to you as lying at Thornburg and What Cheer during the different days in November. Do you have any present independent recollection of those facts to which you have testified, or have you simply told what the reports that you have before you show?

A. Simply gone by the reports I have before me.

6. You have no independent recollection of those things?

A. I have no independent recollection of any one particular day. I have an independent recollection of several times during the time that we mentioned there would be enough cars go into What Cheer on the coal train that got there in the evening that would be all that was necessary for the loading of the day following, and in those cases the cars that were already at Thornburg would be left there and not be taken down to What Cheer for the next day's loading,
but the cars that got to What Cheer in the evening would be
117 the ones that would be placed at What Cheer to be loaded.

7. I want to get at what you have stated, as *to* the number of cars at What Cheer and Thornburg on the different days in No-

vember is not stated as what you at present recollect, but simply what your reports show.

A. Simply what my reports show.

8. Now, you said just a moment ago that the cars that went down on the coal train in the evening were very frequently as many as were required for loading the following day. Do you mean by that that they were as many as the mines wanted to load, or that there were as many as your facilities enabled you to haul out?

A. As many as our facilities would enable us to haul out. There has hardly been a time in the past fifteen months but what the mines could have produced more coal than our facilities would enable us to handle.

9. When you said, then, that during the month of November you furnished what cars were ordered you didn't mean to be understood as saying that you furnished all the cars that the several mines of What Cheer wanted to load, but only the number of cars that were required for loads that your facilities enabled you to pull out daily?

118 A. During a part of the time in November we might have been able to handle a few more cars. We would be able to handle a few more cars than we did only a part of the time during the month. Some days we could handle more and some days handle less, in accordance with the state of the other business of the line of the road, and the expression that we had cars enough down there would refer to the number of cars we could furnish there at What Cheer. The number of empty cars we had sent down there was the average number that they had been loading—that we were able to handle each day.

10. Wasn't there every day of the month of November a greater demand for cars by the mines than you furnished or than you could haul out?

A. As a rule, during the month of November there were more cars loaded at What Cheer than we could handle promptly.

11. Wasn't the demand for cars greater by the several mines using them to get their coal product out of What Cheer than you could furnish?

A. Only during part of the time more than the facilities of the B., C. R. & N. road could furnish themselves.

12. Wasn't there during most of the month of November a greater demand for cars than were actually furnished by any road by the different coal mines being operated?

119 A. During the first part of the month—perhaps the first two weeks or between two and three weeks of the month—there was. After that for a few days in the last part of the month we furnished about all the cars that we needed—that is, there were about cars enough at What Cheer. There could have been a few more loaded if we had the cars to get in there and we had been able to handle the product, but, not being able to handle the product, we didn't put the cars in there, and the mines were running short on that account.

13. Was there being loaded that month, constantly during that month, all the cars the company could handle?

A. Yes, sir; there was.

14. Was the B., C. R. & N. railway getting coal from this What Cheer coal mine?

A. They were getting it from What Cheer. I do not know what particular mine it was coming from.

15. Those B., C. R. & N. cars that were sent down to What Cheer to be loaded with coal—standing at What Cheer and Thornburg to be loaded with coal—were to be first used in supplying the demands of the B., C. R. & N. Co. before any other parties could have the use and control of them?

A. Yes, sir.

16. How many mines were there at What Cheer in November, 1881, in operation, and what, as near as you know, was the working capacity during that month of each mine?

120 A. What I am saying now is from my understanding of the position there. As I have before mentioned, I have never been at What Cheer to know the exact location of it and the exact position of the mines. As I understand it, there was what was called shaft A, with a capacity for producing from 30 to 35 cars a day.

17. What company was that owned by?

A. Star Coal Company. There was the What Cheer Mining and Coal Company mine, with very nearly as much capacity. There was a new mine being opened by the Star Coal Company at the time which was not in working order, which, when running to its full capacity, could, perhaps, run 8 to 10 cars a day—what was known as shaft B.

18. Was that running during November?

A. I would not be positive that that shaft B was open during November. I think it was open during the latter part of November. Then there were two small mines, with a capacity for 2, 3, and four cars per day only. These mines were not on the line of any railroad, but they hauled it in wagons. There was one mine operated by a man by the name — Clubb and another by a man by the name of Blatt (?).

19. Any others?

A. I do not know of any others now.

20. Wasn't there a Muscatine mine being operated during 121 that month with a capacity of 15 or 20 cars?

A. Yes, sir; the Muscatine mine had been opened with a capacity of about that.

21. All these different mines were shipping coal by these cars that were being run in there by the B., C. R. & N. during the month of November, were they?

A. Yes, sir.

22. How many cars of coal was your road able during that month *able* to pull out of there per day?

A. We were able to take out about two or two and a half train-loads—that is, we run out two train-loads of 30 cars of coal each—

what we consider a train-load down there. In addition to that, we have a train running through Thornburg from Montezuma to Muscatine, which trains would take from 15 to 20 cars of coal from Thornburg, leaving it at Riverside, making a capacity for hauling out of there 75 or 80 cars per day.

23. You say that the B., C. R. & N. Co. did, as a matter of fact, during November, average 60 cars per day of coal that they pulled out of What Cheer?

A. I could not answer that question positively without first consulting the train sheets, the record we have at that time of the number of cars we took out of there. It is my impression that we took two trains of coal per day out of What Cheer.

122 24. The mines always furnished you more coal than you could haul?

A. Always furnished all the coal we could haul.

24. More?

A. More than we could get away with. That state of affairs continued up to the present time.

25. It was quite a common thing for the agent from What Cheer to order many more cars each evening than he got for the purpose of loading coal during the month of November, 1881?

A. Yes, sir; he would order more cars than he got. He ordered on the average fifty B., C. R. & N. cars every day. His car report shows he ordered fifty B., C. R. & N. cars and about 50—40 to 50—foreign cars every day.

26. He ordered a great many more cars than he got?

A. He ordered more than he got. He ordered about what the mines could load, or practically all the cars they could load, the next day.

27. You say Brock was up to you an average of about three times a week during the month of November ordering cars. What cars was he ordering—B., C. R. & N. cars of Chicago, Milwaukee & St. P.?

A. Wanted both kinds.

28. Which did he give the most orders for?

A. Well, the kind mentioned most was the C., M. & St. P. cars.

123 29. Now, did the B., C. R. & N. road any time during the month of November allow any of their cars to be loaded that were billed or to be shipped to any station off the line of their road with coal?

A. At one time we allowed four cars to be loaded for a point west of Clarksville on the Dubuque & Dakota road; that is the only recollection I have of there [their] being allowed to go off the line of our road at all.

30. What was the general rule?

A. The rule is that B., C. R. & N. cars were not to go off the line of the B., C. R. & N. road.

31. Not to be loaded with coal to be taken to any point off the B., C. R. & N. road?

A. That was the rule; yes, sir.

32. Now, Mr. Goodell, in sending C., M. & St. P. cars to What Cheer had you any authority to direct by whom those cars were to

be used or for whom loaded or did the company holding the cars have exclusive authority in that regard during the month of November, 1881?

A. The company owning the cars always have the right to dictate who shall load their cars and who they are for.

33. You had no authority, then, to designate by whom these Chicago, Milwaukee & St. Paul cars should be used or for what purpose?

A. No, sir; I had no authority.

34. Now, in distributing cars or sending cars down to What Cheer, Thornburg, or any other point on your road during the month
124 of November didn't you depend entirely upon the orders received from your agent there at What Cheer?

A. Yes, sir; I did.

35. Did you, during the month of November, send any cars there in response to any order except one that emanated directly from your agent at What Cheer or Thornburg?

A. Only from the one that emanated at What Cheer. Cars were never sent to Thornburg except for the purpose of storing. They were set apart on a track at Thornburg for that purpose, entirely different from the station tracks there.

36. When you received orders from What Cheer you directed these cars to be sent there without designating what purpose they were to be used for, except they were to be used in the coal trade?

A. I did not even designate they were to be used in the coal trade. According to my car reports that I have here—for instance, on the 25th day of November, the agent at What Cheer orders five Milwaukee & St. Paul box cars, on the 26th he orders five, on the 28th he ordered 15, on the 15th he ordered 15, on the 14th he ordered seven.

37. Did you know when those orders were sent in what they were to be used for or what ordered for?

A. Well, I knew only by knowing that they could not be
125 used for any other purpose at What Cheer. There was no other business there sufficient to require them.

38. You had no knowledge by whom they were to be used?

A. I had no knowledge by whom they were to be used.

39. You did not designate by whom they were to be used?

A. No, sir.

40. Were not a number of the B., C. R. & N. cars that were at What Cheer and Thornburg during the month of November, 1881, and the forepart of December, used there by the several miners for carrying away slack from the mines to be thrown away?

A. Yes, sir; a majority of the B., C. R. & N. coal cars that were there were used for that purpose.

41. How far was this What Cheer, or the place where these cars were at What Cheer, as you have stated in your examination-in-chief—how far was that from the mines where they were loaded near What Cheer?

A. When the cars were at What Cheer or Thornburg?

42. At What Cheer.

A. I am not familiar enough with the distances there between the side tracks at What Cheer and the side tracks at the mines to be able to answer that question intelligently.

43. Well, it was such a distance from the mines they could not be loaded standing as they did there at What Cheer.

126 A. O, yes; they were at such a distance that they had to be placed by the switch-engine at the mines.

44. How many switch-engines did you have there during November & December, 1881?

A. Only one.

45. Isn't it a fact, Mr. Goodell, that it was impossible for those mines that were being operated at What Cheer during that time to get so that they could be loaded, all the cars that were there at What Cheer and Thornburg for the purpose of being loaded, with coal?

A. Some time during the month of November we were without a switch-engine at What Cheer. I do not remember the dates or length of time, how long it was, but during that time the trains that would go in there at night—the coal trains that would go in after they got there—the engine that went in on that train would be used for placing these cars at the mines to be loaded the next day and to take out the coal already loaded, and during that time all the cars that were there—we did not have the capacity or power to place all the cars that were to be loaded at Thornburg and What Cheer both.

46. When you had the switch-engine there wasn't it much more difficult for the mines to get cars at that point, where they were loaded, than it was to get the cars from along the line of the road down to What Cheer?

127 A. Why, I don't know that it was. I am not sufficiently familiar with the working of it at the time down there to be able to state positively just how that was, but as I understood it at the time, that was not the case.

47. Wasn't there a permanent order out at that time that no switch-engines should go to the mines after dark, on account of the condition of the track leading to the mines.

A. At some of the mines that order was in force; just what mines it was and the location of those mines I cannot at present tell.

48. Now, wasn't there frequently a great many loaded cars between the empties that were lying at What Cheer and the side tracks that run off the main tracks to the mines?

A. Yes, sir.

49. So these empties could not be taken in there?

A. Very frequently there was a number of loaded cars in between there. We did not have the power to take out of What Cheer; neither did we have side tracks to store the cars. There was no way only for them to stand at the mines where they had been loaded until we could get more power down there to take them out. At that time we could not get empties to the mines to be loaded, although they were at Thornburg and What Cheer at the time.

Redirect examination:

1. You have spoken in your cross-examination of the coal—
128 of getting cars from the side tracks to and from the mines. Now, in spite of the difficulties you have mentioned, did the company in fact, during the month of November, 1881, take out from 75 to 80 car-loads per day, on the average, from those mines?

A. I could not swear to that point positively without first consulting the records that I have at my office showing the number of cars taken out at What Cheer during that time. It is my impression now that there were about two trains per day, on the average, coming out of What Cheer and, in addition to that, what cars what we call our local train could haul between Thornburg and Riverside. The grades of the road are such that between Thornburg and Riverside our ordinary standard freight locomotive can haul 30 loads of coal. Between Riverside and Iowa City they can haul the same number, but between Iowa City and Cedar Rapids they can only haul 17.

2. Now, besides these two trains, was there a train from Muscatine to Montezuma that took coal from the mines?

A. There was a local freight train between Muscatine and Montezuma that took some coal that had been taken up to Thornburg and hauled it up to Riverside.

3. Would that be included in the average 75 or 80 cars?

129 A. Yes, sir; that would be the total amount that we took out from there.

4. Now, you have been asked on cross-examination your understanding as to who owned the mines in November, 1881. Do you recollect about the 7th of November, 1881, that the Northwestern Fuel Co. took possession of some of the mines; was that your understanding?

A. That was my understanding—that they took possession of the output of the mines.

5. How many of the mines.

A. Two.

Objected to as incompetent, immaterial, and calling for the opinion of the mere surmise of the witness.

6. What two mines?

A. The What Cheer Land & Coal Co. mines and the Muscatine mines.

7. Now, do you recollect or know whether the track was completed down to the Muscatine mine at the time the Northwestern Fuel Company took possession of it?

Objected to as incompetent, the witness already having testified that he was never on the ground to know and see, and as being hearsay.

A. My understanding was that the tracks were completed about that time to the Muscatine mine.

8. Do you know from the course of business with the coal

mines who was superintendent of those two mines for the Northwestern Fuel Company after it took possession?

A. No, sir; I do not know that I ever understood who the superintendent of the various mines were for that time.

9. About how much coal did the B., C. R. & N. Railway Company take from those mines during the November, 1881?

A. They took what we call lump coal for the firing of the engines, about 20 cars per day, on an average. In addition to that they took, I think, in the neighborhood of 4 or 5 cars per day of this slack for the purpose of putting it on the track to make ballast.

10. Well, was that slack run out in these coal trains you have spoken of or by gravel or construction trains?

A. Went out in the coal trains—handled by the coal trains entirely.

11. You spoke on your cross-examination of four cars—B., C. R. & N. cars—being ordered at one time onto the Dubuque and Dakota road; who were those for?

A. Mr. Brock came and saw Mr. Ives. Mr. Ives gave him a note to me allowing four B., C. R. & N. cars to be loaded for the D. & D. road, to go onto the D. & D. road. Acting on that, I sent the order to the agent at What Cheer to allow four B., C. R. & N. box cars to go onto the D. & D. road.

12. Do you know what date that was?

131 A. No, sir.

13. Can you tell whether the cars were loaded for the D. & D.?

A. I cannot state positively from recollection; no, sir. I do not recollect whether they were loaded or not.

14. During November, 1881, were the C., M. & St. Paul Company giving directions as to their cars that went to the mines there?

A. No, sir; none that I have seen.

15. Do you say that Mr. Brock was inquiring particularly during the month for C., M. & St. Paul cars?

A. He spoke particularly regarding those cars.

16. Do you recollect what number he wanted per day?

A. At just what time during the month I could not state, but at one time he said he wanted to load at least five per day—Chicago, Milwaukee & St. Paul cars.

17. Do you know from your communication with the C., M. & St. P. Co. whether they had any arrangement with Brock about furnishing him their cars at that time?

Objected to as incompetent and immaterial.

A. I had no communication whatever with the Chicago, Milwaukee & St. Paul people regarding the disposition of their cars and no directions from them as to whom their cars were to be delivered to.

At one time during the month I remember Mr. Brock incidentally showing me a letter that he had received from the

132 coal agent of the Chicago, Milwaukee & St. Paul road regarding some coal, saying to load their cars; to order their cars and load them.

18. Did that circumstance have reference to the What Cheer coal?

Objected to as being incompetent—calling for the opinion of the witness and contents of the writing.

A. I do not think What Cheer coal was mentioned in that. I do not think the word What Cheer was used in regard to the coal.

19. Did Brock show it to you as having reference to the What Cheer coal? What explanation, if any, did he make about it?

Objected to as entirely incompetent and immaterial.

A. He showed it to me in this way: He was in my office asking about the number of Chicago, Milwaukee & St. Paul cars that we would have on the road unloading. At that time there was quite a quantity of lumber coming from lumber points along the line of the Chicago, Milwaukee — St. Paul road destined for points on our road which came to us loaded in Milwaukee & St. Paul cars, and Mr. Brock was asking more particularly as to the prospects of being able to get those cars—as to whether those cars were on the line of the road, whether we had many of them or not—and incidentally, in speaking of that, he mentioned this and showed me this com-
133 munication that he had.

20. Well, what point did he want the C., M. & St. P. cars for?

A. Mr. Brock asked me for C., M. & St. P. cars for What Cheer, and also for some for Illinois.

2-. Well, which point, if either, did he want to give the preference in supplying St. Paul cars?

Objected to as immaterial, incompetent, and not redirect examination.

A. What Cheer he wished to have the preference.

22. You spoke, on your cross-examination, of B., C. R. & N. coal cars used down there to handle slack coal. How many cars were used for that purpose?

A. Sometimes there were more and sometimes less. It depended on how it was unloaded. There would be from 3 to 5 coal cars per day loaded with this slack coal. Very frequently those cars would remain loaded, before being unloaded, some three or four or five days before we would unload them, and then we would unload them all in a bunch—8, 10, or 15 at a time—in order to lessen the work. At those times there would be those cars waiting loaded with the slack.

23. Now, in speaking of freight cars, do railroad men distinguish between coal cars and the usual freight car? If so, what is a coal car and what is a freight car?

134 A. There are four kinds of cars; four radical classes of cars: the box car, the stock car, the coal car, and the flat car—the box car being built more particularly with reference to the handling of grain, merchandise, and stuff that should be protected from the weather; stock cars being built, of course, with reference to the handling of stock, and coal cars being built more especially with

reference to the handling of coal. They are built as a plain flat car. The trucks of the car are the same as an ordinary box car or stock car. It may be called a flat car—just level; then sides, sometimes two and sometimes 3 to 3 and a half feet high, all around the car, open at the top, depending on the heft of the body of the car as to how high the sides would be with reference to the carrying capacity of the car.

24. During a portion of the year, do you use flat cars for temporary coal cars; and, if so, how are they fitted up?

A. Very nearly every summer on the B., C. R. & N. we have had new flat cars. Those are used in the construction trains hauling gravel, stone, &c., and in the fall those cars are taken in and what we call racked for coal cars. Stakes are placed in the sides and ends and heavy planks are put inside of them—some 2, 3, & 3 and a half feet high—put in with reference to carrying coal.

25. Making a practical coal car?

135 A. Makes a regular coal car out of it. The flat car is merely a coal car with the sides taken off.

26. During the month of November, 1881, could your switch-engine there at What Cheer handle 75 to 80 cars a day, putting them into the mines and pull them out?

A. Well, everything in consideration, the way it was there, the way the trains ran—no, sir; they could not. I wish to correct that. They could, provided the cars got there at the right times. At certain of the mines the tracks had run down—had got in such condition that it was unsafe to do work on them at night, the grade of the track being such to get up to where the mines were. It was very steep upgrade from the main track up to the mines. In order to get the cars up there they had to run fast—run at a high rate of speed to get them up over this grade. The track was in a condition so that it would not stand it—that it was not safe to undertake to do that at night. When the cars got there in the daytime—and they could be placed in the daytime—they could handle them all right; but that number of cars could have been handled if they could have been gotten there at the right time, but with the arrangements for running the train we could not handle them always.

136 27. How was the What Cheer mine at that time with respect to its track?

A. Well, I do not remember how it was.

28. Well, the What Cheer mine hadn't been open very long at that time—in November, 1881, had it?

A. I think it had; yes, sir; I think it was opened during the summer.

29. Well, the track of that mine was new at that time?

A. It was comparatively new; yes, sir.

30. Were the train engines there when they went into What Cheer in the habit of switching, helping the switch-engine about the work?

A. Not of helping the switch-engine; no, sir; only when the switch-engine was disabled for a while the road-engines would work.

31. When the switch-engine was there that did the switching?

A. Yes, sir; the switch-engine that was there was what we call a road-engine with the pilot taken off and arranged for switching purposes.

Recross-examination:

1. You said that Mr. Brock, during November, asked you to give him at various times Chicago & Milwaukee cars. Did you, as a matter of fact, give him any of those cars?

A. Mr. Brock asked me to have those cars sent to What Cheer to be loaded with coal. Upon getting the car reports from
137 What Cheer each day the agent at What Cheer also ordered Chicago, Milwaukee & St. Paul box cars. I sent the cars to What Cheer on that order—on the order of the agent at What Cheer.

2. Did you, then, as a matter of fact, ever send any Chicago, Milwaukee & St. Paul cars to What Cheer to be loaded for Mr. Brock?

A. Not to be loaded for Mr. Brock personally; no, sir. Mr. Brock having come in to see me and speaking about the cars, I very naturally inferred on getting the order from the agent at What Cheer for the Chicago, Milwaukee & St. Paul cars—I naturally inferred the cars would be loaded for Mr. Brock, but that fact did not enter into the argument in sending the cars to What Cheer.

3. Did you ever send any cars with orders to be loaded for Mr. Brock?

A. No, sir; never gave any orders to any agent at the station.

4. That is done by the agent at the station?

A. Yes, sir.

5. Your road has no authority or right to have the cars of another road go another way when the other road has made arrangements to have the cars loaded?

A. Not in opposition to its wishes.

6. Where cars are needed for a specific purpose or for par-
138 ticular persons isn't it always necessary and usual that the order be given to the agent where the cars are sent?

A. That is the order of the company that has been in effect for a number of years.

7. Now, as a matter of fact, Mr. Goodell, were not arrangements made by the Milwaukee & St. Paul company to have all their cars loaded and used by the Star Coal Co. for points on their line during the month of November and the forepart of December?

A. I have no positive knowledge of any arrangements having been made between the Milwaukee & St. Paul company and any of the shippers at What Cheer that their cars were to be loaded for them or by them exclusively for points on the Milwaukee & St. Paul road. I know that at the same time that Mr. Brock spoke to me regarding sending Chicago, Milwaukee & St. Paul cars to What Cheer Mr. Foster and Mr. Vincent each of them at different times spoke to me also and asked regarding the supply of Milwaukee & St. Paul box cars on the line and what was being done with them, and I told them the cars were being sent to What Cheer. The cars

were ordered by the agent at What Cheer and were being sent there, but I had no knowledge from the Milwaukee & St. Paul Co. that the cars going to What Cheer were to be used exclu-
139 sively by any party. In fact, that part would not come to me any way, because with the furnishing of the cars at What Cheer, in obedience to the orders of the agent—that is, to fill the orders of the agent there after sending the cars to What Cheer—when they got there my duty in connection with them would be done, and if they were to be loaded at What Cheer by any particular party for any specific purpose by request of the company owning the cars that request would be made upon Mr. Ives, the general superintendent, and his order would be given to the agent at the shipping point as to what parties or party was to have the preference of the loading of those cars.

8. Wouldn't the company owning the cars that were sent on your line of road to be loaded make arrangements as to their use with the parties who were going to use them without doing it through Mr. Ives or any other person connected with your road, unless it should be with the agent at the station where they were to be loaded?

A. They would first make their arrangement with the party who was to load them, and they would afterwards request Mr. Ives or Mr. Williams, the superintendent, to deliver such of their empty cars as we got to this party to be loaded for them.

9. In all cases?

A. In all cases there would be some documentary evidence
140 sent to this company, and the request when it came here would be presented to Mr. Ives or Mr. Williams.

10. Supposing, for instance, the Chicago, Milwaukee & St. Paul Company had made arrangements with the Star Coal Company or any other person to have all their cars that went to What Cheer loaded by the Star Coal Company for them, would it be necessary or would they be likely to communicate that arrangement to the superintendent or any other person connected with the road unless it should be to the station agent at What Cheer, or would it be sufficient simply to send the cars there to What Cheer without designating what or by whom or for what business they were to be used for?

A. They would hardly make arrangements of that kind with the Star Coal Company or with any other company, that they were to have all of the Milwaukee & St. Paul cars that we got empty; they would hardly make arrangements with such shipper without first giving some directions in some way to the B., C. R. & N. Co. to deliver such cars to this shipper to be loaded.

11. I do not mean where they have made arrangements with the shipper for all their cars that come on the line of the road; but where they have made arrangements for the shipper to use all their
141 cars that reach a certain station on the road, would it be necessary or usual for them to communicate that arrangement to the superintendent or any other official of the road, unless it should be the agent at the station where the cars were to be loaded?

A. It would be usual to make some communication with the head

of the department in some manner that it was their wish that the cars should be used by a certain party. You could readily see how a shipper at a point on the line of road could go to the agent and say, "I have permission from such and such a company that I can load all their cars that come to this station." Now, some other shipper might come there and say, "I want to load this same kind of cars;" or if Mr. Foster should go to the agent at What Cheer and say, "Here, I have a request from the Chicago, Milwaukee & St. Paul Co. that I am to load all their cars that come here. I have an order that I am to have all their cars that come to this station." Then Brock should come and say, "I want to load all Chicago, Milwaukee & St. Paul cars that come to this station." Then it comes to the question to the agent which is the better entitled to these cars. Then he would say, "Gentlemen, if you have any evidence to show that the Chicago, Milwaukee & St. Paul road want you to have all their cars, if you have any evidence to produce to show that,
142 then you can have all their cars that come to this station; otherwise it will have to be divided among all the shippers that want to use them at this station.

12. Well, then, if such persons claiming a certain lot of cars belonging to another road at a station on your line should exhibit a written authority to have and load them to the agent there, emanating from the line owning the cars, that would be sufficient without any authority from an officer on the road?

A. That would be all the agent would require. If he should see a written authority from the company owning the cars that it was their wish that a certain shipper should have those cars to load he would be justified—in fact, he would be in duty bound—to give those cars to the shipper having such an order.

Redirect examination:

1. Do you know, Mr. Goodell, whether during October and November, 1881, empty cars were sent your line by the C., M. & St. Paul for What Cheer, loaded there, and returned to the C., M. & St. Paul?

A. I do not remember, but I think not. I think there were no empties sent to us by them direct; all, I think, we used of their cars were such as were unloaded.

2. Would your reports that you have here show that it was the case?

A. No, sir; they would not show it.

GEO. A. GOODELL.

143 Examination closed.

Sworn to and subscribed before me and in my presence by said Geo. A. Goodell on this 22 day of November, A. D. 1882.

[L. S.] F. C. HORMEL,
Notary Public in and for Linn County, Iowa.

By agreement the further taking of depositions is adjourned until Monday, November 20, at 10 o'clock a. m.

Which said deposition is endorsed as follows:

No. 66. N. W. Fuel Co. *vs.* R. G. Brock *et al.* Deposition of G. A. Goodell on part of defen't. Filed Nove'r 25, 1882. A. J. Van Duzee, clerk U. S. cir. court, northern dist. of Iowa.

144 E. N. SAUNDERS recalled for defendant:

Q. You spoke yesterday of contracting in November for the product of shaft A of the Star Coal Co. with certain reservations. Did your company in like manner contract with the Star Co. in November, 1881, for the product of shaft B with certain reservations as to local trade?

A. We didn't make any contract in November with that company. Our contract with the Star Coal Co. was for their coal, irrespective of their shafts, and it may have been made some length of time prior to that, and was a long-term contract.

Q. It was made prior to November and covered the product of both shafts?

A. It covered the products of any shafts they had.

Q. Do you recollect what shafts they had in November?

A. They had two large mines. I do not know what else.

Q. Now, did you have a contract in November, 1881, for the product of any other mine at What Cheer besides the Star mine—the Star Company?

A. I do not think, in the form of a term contract, that we had, but we were buying coal from other mines in such quantities as we could get.

Q. What other mines?

A. I think there was a concern called the Rosetta Mining Co. and one called the Muscatine that we at that time got coal

145 from.

Q. Did you get the larger part of their product during November?

A. Well, sir, I could not say. I was not sufficiently well posted as to what their product was at that time.

Q. Did you get all you could of them?

A. Got all I could get cars down there for from every source.

Q. Were there other mines to your knowledge at What Cheer other than those you have mentioned, namely, the What Cheer mine you had leased, the mines of the Star Co., the mines of the Rosetta Co., and the mines of the Muscatine Co.?

A. I think there were one or two small mines there besides those.

Q. These other mines were local mines and not connected by switches or tracks with the railway?

A. I could not say how they were situated in that respect.

Q. What was the policy of your Northwestern Fuel Co. in securing this coal at What Cheer—what scope of country was it designed for—Iowa or the country north of Iowa?

A. We had no business in Iowa; never did any business with this kind of coal in Iowa. It was all intended for our business

proper, which lay at St. Paul and Minneapolis and north of there.

Q. You didn't want any Iowa business?

146 A. We had no acquaintance in Iowa; no arrangement for doing business in Iowa.

Q. Never have done business in Iowa, except with Mr. Brock to a limited extent, have you—that is, as to selling?

A. As far as selling coal from Iowa mines in Iowa, I never have done any business; my arrangements where wholly with a view of getting coal up north.

Cross-examination:

Q. With the exception of the What Cheer mine, that you leased, you were a purchaser in the market?

A. I bought it from whatever sources I could get it.

SAMUEL GILFOY recalled for def't:

Q. What rate were you paying coal miners per bushel for mining coal at the What Cheer mine in November, 1881?

Objected to by pl'ff as immaterial; objection overruled.

A. We were paying the coal miners 4 cents a bushel.

Q. How many bushels does it take for a ton?

A. 25, I believe.

Q. What were you paying during December, 1881?

A. The same price, I think.

Q. How was it in January, 1882?

A. I think the same price.

147 Q. February, 1882?

A. 4 cents a bushel.

Q. March, 1882?

A. 4 cents a bushel.

Q. April, 1882?

—. Three and a half cents a bushel, I think.

Q. May, 1882?

A. Three and a half cents.

Q. June, 1882?

A. Three and a half cents.

Q. I want to ask you, Mr. Gilfoy, in reference to what price you paid miners p'r bushel in October, 1881?

Objected to as immaterial; objection sustained, and defendant excepts.

Cross-examination:

Q. You said four cents a bushel was the cost of mining. Is that the entire cost?

A. No, sir.

Q. What is to be added to that?

Objected to as immaterial, incompetent, not cross-examination,

and as calling upon this witness to give a legal construction of the contract in controversy; objection sustained.

Witness dismissed.

R. G. BROCK recalled for defendant:

Q. Mr. Brock, this contract is dated in July, 1881. Did it immediately go into operation?

A. Yes, sir.

Q. And did you receive coal under it during the months
148 from July to November, when the Northwestern Fuel Co. took the contract?

Objected to as immaterial; overruled.

A. Yes.

Q. Now, during the time that you received coal under the contract, did you receive nut as well as lump coal; and, if so, what proportion of nut coal did you get as compared with the lump coal from the mine—that is, in what proportions did they run respectively?

Objected to as immaterial.

Amendment to defendants' cross-bill filed and plaintiffs except to the ruling admitting the amendment.

Plaintiffs object to any testimony under the amendment on the ground that it does not state a cause of action.

Last question withdrawn.

Q. Do you know, Mr. Brock, what the market price of lump coal per car-load was at What Cheer, on the track, from December, 1881, to and including March, 1882?

Objected to by plaintiff on the ground that he is not entitled to prove the market price unless he confines it to the market price of coal in such quantities as was specified by this contract.

Q. Do you know the price in car-load lots?

Objected to unless confined to 12 car-load lots; overruled, and the same objection to apply to following question on same point.

149 A. I think I am familiar with it.

Q. What was it?

A. During the month of December it was worth $2.25 a ton by the car-load.

Q. How was it in January, 1882?

A. The same price.

Q. In February?

A. The same.

Q. In March, 1882?

A. I am not quite positive but what it dropped off 25 cents in March, but I think it did not until April.

Q. How was it in April, May, and June?

A. I think it was two dollars a ton.

Q. How many tons make a car-load of coal, as it was delivered there at What Cheer in 1881 and 1882—lump coal?

A. They run from 12 to 20 tons. The average probably would be 14 tons—28 thousand pounds—ordinary box car; that is the least we would expect to be loaded on a car.

Q. I think you have testified that after the 3rd of December, after receiving this letter from Mr. Foster, you received no coal whatever from the Northwestern Fuel Co. on this contract?

A. No, sir; we did not.

Q. Was your firm ready and willing to take the coal in accordance with the terms of the contract?

A. Yes, sir.

150 Q. Until the time fixed by the contract when it expired?

A. Yes, sir.

Q. Do you recollect when that was?

A. I think it was on the 1st day of July, 1882. I am not quite positive whether it expired on the 1st day of July, although I think it did. The contract was made about the 13th of July, and whether the contract run for a year or ended at the first of the month I do not know.

Q. I asked that the jury might know generally. Your requests to Mr. Gilfoy for coal, which have been introduced in evidence from November 16th to November 30th, show that you ordered during that period of time 11 cars of nut coal. What did you want that nut coal for?

Objected to as immaterial; objection overruled. The fact that defendant wanted it for trade is admitted.

Q. Do you recollect how many cars of this nut coal you received?

A. We might have received a car or two, but the best of my recollection — I do not think that we received a car of nut coal after the 9th of November.

Q. That is, from the Northwestern Fuel Co.?

A. Yes, sir.

Q. Here is the schedule for November. You can refresh your memory by looking at that and see whether you received any

151 nut coal after the 16 of November covered by these letters.

A. According to this, we did not.

Q. At the time the Northwestern Fuel Co. refused to further perform this contract had you worked up a trade for nut coal; and, if so, to what extent?

Objected to as immaterial; objection overruled.

A. Yes, sir.

Q. To what extent?

A. I am not able to answer that definitely.

Q. Give a general idea of it.

A. I should say 3 to 5 cars per week, to the best of my recollection.

Q. Had you made any permanent arrangements in regard to furnishing nut coal?

A. Yes, sir.

Objected to as not within the measure of damages; objection sustained.

Q. I understand you to say that you had worked up a trade of from three to five car-loads per week?

A. I think so.

Q. Your letters show that you demanded coal at about that rate from the 16th to the 30th of November. Were you ready to go on and receive nut coal at that rate if the contract had not been repudiated?

Objected to as not material, irrelevant, and leading; objection sustained.

Q. Do you know, Mr. Brock, what the market price of nut
152 coal was per car-load per ton on the track at What Cheer in the month of November, 1881?

Same objection as to the questions in regard to price of lump coal and same ruling.

A. I think in the month of November we were selling at about $1.75; that or two dollars, I am not quite positive which from recollection. I have our books here, which will show the price which we sold for at that time.

Q. Did you sell at the market price?

A. I think we did.

Q. Do you know what the market price of nut coal was by the car-load on, the track at What Cheer, from and including December, 1881, up to — including June, 1882?

Same objection as to previous question. Overruled.

A. Well, I don't know that I understand the question exactly—whether I am supposed to know the market price that other people were selling at. I know what we were selling at—all we could get.

Q. I want to know from all your sources of information whether you know what the market price was for that period of time?

A. I think I do.

Q. Now go on and give it for each of those months, if you please, Dec'r 1881, to June, 1882.

A. From December, 1881, to about 1st of April, 1882, it
153 was worth $2.25, in the way we sold, it by the car-load. I would not be positive to the exact date, whether it was March or April. I think April was the time the price changed again. I think April and May was sold at $2.00; I think June $1.75. In some instances we probably got more, may be 25 cents a ton more.

Q. I want you to speak of the general market price.

A. That is what I mean.

Q. Up to the time that the Northwestern Fuel Company took the What Cheer mine had there been any difficulty about cars in which to transport the coal from that mine.

Objected to as immaterial; objection sustained.

Q. I will ask you when, Mr. Brock, any difficulty arose under this contract in regard to procuring cars for the coal that you were entitled to?

Objected to as immaterial.

(The COURT:) You can answer the question, and whether the answer is proper I will determine when it is given.

A. Well, do I understand that that reaches back prior to the 7th of November?

Q. I do not design to have it.

A. I could not say just when there was any difficulty in regard to that.

Q. How soon was the difficulty after the Northwestern Fuel Co. took the mine?

Objected to as immaterial; objection overruled.

154 A. I did not understand that there was much difficulty until the end of the month.

(The COURT:) What do you mean by the month?

A. November.

Q. How soon after the Northwestern Fuel Co. took possession of the mine did you fail to receive coal in compliance with your requests upon the company for it?

A. I could not answer that question definitely, from the fact that we might have received some of that coal that was shipped the fore part of the month in December or January. It is nothing unusual in our business to have cars lay back and receive them for a long time after they have been loaded.

Q. I think you have testified to an interview with Mr. Foster that occurred about the 20th of November; is that the time as you recollect it?

A. I had an interview with him about that time; yes, sir.

Q. Where did that interview take place?

A. In Mr. Foster's offices, in Cedar Rapids.

Q. Now, you have detailed substantially what he said; did he at that time, when you have testified that he said you should have no more coal, make any complaint whatever about the question of transportation?

Objected to as leading; objection sustained.

Q. State whether Mr. Foster at that interview made any
155 complaints in regard to the matter of transportation; and, if so, what he siad in that behalf.

Same objection and no ruling.

A. I do not recollect that the matter of transportation was brought up at that time.

Q. When, if at all, was the matter of transportation first discussed between yourself and Mr. Foster?

A. I think it was somewheres in the vicinity of the 1st of December; perhaps the latter part of November or first part of December.

Q. Was it before or after you received this letter dated December 3d and signed by Mr. Foster?

A. I think it was before that.

Q. How long before that?

A. Well, I am unable to say. I should think it was after the 20th and before the first of December.

Q. After the 20th, as a letter shows that you received no coal except the one car-load that was sent by mistake. Did you go to see Mr. Foster after the 20th to see why you did not get your coal?

A. I think I did. It is hard for me to recollect the exact dates. I know during that month, during the period of the time that the Northwestern Fuel Co. took that mine until the 3rd of December. It is pretty hard for me to determine which question was discussed first or last, as we had several interviews with different ones
156 connected with the mines, so I would not be positive as to dates during that period.

Q. Go on and give what transpired between you and Mr. Foster after this interview that you have already related, when he told you that you should have no more coal.

A. I think at one time I met him, I think it was in his office, the matter of transportation was brought up. I think I called upon him to see why those four B., C. R. & N. cars were not loaded and delivered to the D. & D. road, as I had a special order from Mr. Ives for those cars for those points. I think that is the time the matter of transportation came up.

Q. What was said between you?

A. He said we had not furnished the cars. I told him I understood that we had. He said we had not; simply sending the cars down to What Cheer did not furnish the cars to them, or something to that effect. I asked him if he expected me to come down there with a mule team and haul them to the mines. We had some conversation of that kind, as we had been in the habit of sending the cars to What Cheer, and Mr. Gilfoy had always called for his cars there in accordance with our orders. He claimed that we did not deliver the cars to him, consequently he did not load them.

Q. What did he say in regard to the 4 D. & D. cars?

A. That is what he said in regard to them, that we didn't deliver the cars.

157 Q. What did he say then as to furnishing any more coal, if anything?

A. I do not recollect that there was anything said about that at that time.

Q. That was after the conversation—the 20th?

A. I think it was towards the latter part of the month. I would like to—I recollect more that he said in regard to that.

Q. Give the whole conversation.

A. I recollect that he said that one reason was that we did not

deliver the cars; another was that the B., C. R. & N. Co. did not allow him to send any cars off the line.

Q. After the receipt of these two letters of Mr. Foster, did you confer with Mr. Saunders in regard to your contract?

A. Yes, sir; Mr. Saunders called upon me.

Q. What did you tell him in regard to be- willing to fulfill the contract and go on with it?

A. I told him we were perfectly willing and ready to go on and fulfill the contract if he would on his part.

Q. What did he say?

A. He didn't make but very little answer to it; simply demanded the money for what he had furnished.

Q. What did you tell him about paying?

A. I told him we were willing to pay for the coal if he would go on with the contract. I told him I felt that we had a right to withhold that money until he would fulfill his part of the contract.

158 Cross-examination:

Q. When you spoke of the market prices at What Cheer what do you mean? Do you mean the prices at which you sold this coal you got there by the car?

A. Yes, sir.

Q. And in every price that you put on a car-load of coal you mean the price at which you sold it by the single car-load at What Cheer?

A. That is my understanding of what others were selling it at.

Q. I understand your basis is your selling price. You were a call broker, were you not? You bought in the market and sold to other persons?

A. Yes, sir.

Q. And the price you put on as the market price at What Cheer was the price you sold to your customers by the car?

A. Yes, sir.

Q. You do not put on the market price what you thought coal could have been bought at What Cheer, by the 12 car-load lots, from the original producer?

Objected to; objection overruled.

Q. You do not give the basis. Your basis is not the prices at which a man could purchase from the original producer coal, in 12 car-load lots per day, to run through a period of a year?

159 A. It is usual to make a reduction in a price on 12 months.

Q. I say you do not, in stating your price, assume the coal as being the price at which it could be purchased by a broker, in 12 car-load lots, running a year to 6 months, per day?

A. No; I do not know of any such contract at that time.

Q. Now, Mr. Brock, in this interview that you had with Mr. Foster—in either of the interviews you had with Mr. Foster—along the latter part of November, 1881, was there anybody present besides you and Mr. Foster?

A. I think one of Mr. Foster's clerk's was present.

Q. Who was he? Do you remember him?
A. I think Mr. Watts. I think his name is H. E. Watts.
Q. He heard the conversation.
A. I think so.
Q. Do you know Mr. Vincent, of Cedar Rapids?
A. Yes, sir.
Q. Was he present at either of the conversations?
A. I think he was at one of them.
Q. The first or the second?
A. I don't know which. One of the conversations we had he was not present.
Q. In one of those first conversations wasn't Mr. Vincent present, and did not Mr. Foster at the first conversation, before the letter of Decem'r 23rd was written, did he not tell you to the effect
160 that you could have all the coal you wanted according to your contract, but you must furnish the transportation because they were unable to get it?
A. I do not recollect any such conversation with Mr. Foster.
Q. Didn't he, in addition to that, tell you the only trouble was you did not furnish cars, and that you must do it in order to get coal?
A. He might have said something to that effect at the time that we had the conversation in regard to transportation.
Q. When you say that he said he would not put his hand in the pocket of the Fuel Co., didn't he say at that time that the Fuel Co. could not get your cars and he could not undertake to assume the responsibility of getting cars, and you must perform on your own part and then you would get coal?
A. I do not recollect that.
Q. Will you say that it didn't occur?
A. I would not say that it did not occur.
Q. Were you not advised from the first that he wanted you to furnish those cars and wasn't that his continual complaint, that you must furnish cars?
A. No, sir.
Q. Did he ever make that claim?
A. He made that claim at the latter part of the month.
Q. Now, then, when Mr. Saunders came down there, when
161 was that? That was along in December, wasn't it?
A. I think it was about the middle of December.
Q. It was after your bill for the previous month's coal had become due. Didn't Saunders, in his conversation with you at that time, tell you that you could have all the coal you wanted under the contract and he would be glad to furnish it if you would only furnish the cars?
A. I do not think Saunders ever told me that.
Q. Will you say he did not?
A. To the best of my recollection, he did not.
Q. Did he not in that interview tell you that he regarded your contract with him as a good contract for him; that it made money for the Northwestern Fuel Co., and he would gladly furnish cars?

A. No, sir; I do not remember of his telling me that.

Q. About the 3rd of December you were served with notice under this contract—the provision that either party would have the right to terminate the contract in 5 days?

A. Yes, sir.

Q. Did you take any steps during the intervening 5 days? That notice informed you that unless you paid that bill they would terminate the contract?

A. Yes, sir.

Q. Gave you five days to do it in?

A. Yes, sir.

Q. Did you take any steps during that five days to furnish
162 any cars or pay that bill?

A. I do not think I did, from the fact that they had refused previously to furnish any coal, and I had tired myself out furnishing cars.

Q. You considered the contract entirely abandoned and at an end?

A. Certainly; I understood that from the fact that they had refused to furnish any more coal.

Q. Did I understand you to say you had tired yourself out furnishing cars?

A. I had become weary of it; yes, sir.

Q. Will you tell this court and jury what car you ever furnished the Fuel Co., at What Cheer mines, to be loaded, besides the four cars that were sent on a special order of Mr. Ives?

A. I sent quite a number of C., M. & St. P. cars; also B., C. R. & N. cars.

Q. Did you designate them as being your cars?

A. I did not designate them to the Northwestern Fuel Co., for that was not the ordinary way of doing business.

Q. Who did you give your instructions to?

A. To Mr. Goodell, the train-despatcher.

Q. Whose evidence was taken here?

A. Yes, sir.

Q. Is that the extent of your efforts?

A. No, sir.

Q. To who else did you go?

163 A. I think I went to Mr. Ives; sometimes, I think, I called upon Mr. Williams.

Q. You went to What Cheer several times, you tried to get Grant. What I want to know is, whether you succeeded in getting there, at What Cheer, several times?

A. Not several times during that period; I was there twice during that period.

Q. Did you ever apply to Grant at What Cheer for cars during that time?

A. Yes, sir.

Q. Did you get them?

A. I don't think we did.

Q. Your applications to the railroad agent at What Cheer were declined?

A. We never got the coal.

Q. Did Mr. Grant ever give you any cars?

A. I went to Mr. Grant or whoever was in the office at the time; I don't remember whether it was Grant or some one else.

Q. I want to know whether or not Mr. Grant or any one else there gave you any cars; that is what I want.

A. They said Mr. Gilfoy could have the cars.

Q. Did he ever say that in Mr. Gilfoy's presence?

A. I do not know whether he ever did or not.

Q. Do you know whether he ever did give them to Gilfoy for you?

A. I don't know.

Q. You heard Gilfoy's testimony upon the stand yesterday?

A. A portion of it.

164 Q. He testified on the stand that he used his best efforts during the month of November to get you all the cars he could, and that the cars he sent you were the utmost he could get you.

A. I did not hear that testimony.

Q. He did so testify. You are not prepared to say that is not true?

A. Only from hearsay.

Q. Gilfoy also said that from time to time, when you came down there he told you, or wrote you that he sent you written statements showing just what cars he had had and how he used them.

A. I do not think Gilfoy wrote me a letter that we received from the time—the 7th or 9th of November—from the time that was transferred.

Q. You say Gilfoy never sent you any such statement as he says he sent you during the month of November?

A. If he did it was the latter part of the month, very late in the month of November. I am not prepared to say he did not; I am prepared to say they didn't get to me.

Q. These orders from the 16th of November, do they show the character of your orders during the month of November?

A. O, no; I presume not.

Q. They do show the character of your orders from the 16th day of November on?

A. I do not know whether they do or not.

Q. You have put them in evidence; they go as far as the orders go?

A. There may be more orders.

165 Q. Did you order 12 cars of coal per day right along?

A. I presume that we did not after the fore part of November.

Q. Did you consider that you were under no obligations to order 12 cars a day unless you need it in your business?

A. We had orders in there.

Q. I am asking your idea. In your view of this contract, did you consider that you had a right to order less than 12 cars if you saw fit?

A. Yes, sir; we had a right not to order any one day if we had sen*d* in the previous day an order of 25.

Q. But you did not need to order 12 cars a day unless your business called for it?

A. We didn't need to send in just 12 cars each day.

Q. You might have fallen below?

A. I didn't understand it that way.

Q. Were you able to accurately gauge the matter so as to order 12 cars a day? Will you swear that your orders for every month aggregated 12 cars a day?

Q. Objected to.

Q. Will you say after we took charge that your orders amounted to 12 cars a day of lump?

A. I don't think it did.

Q. Your idea was that you had a right to order up to that or fall below?

A. I had a right to order 50.

Q. And you governed yourself accordingly?

166 A. For instance, if we had previously sent in orders for 50 cars we would not necessarily have to send in any orders the next day.

Q. Will you produce that notice that we served on you?

A. I do not think I have it.

Counsel for defen't here produce a document.

Q. Is that the one that was served on you?

A. I could not say.

Q. Will you be kind enough to look and see if you can inform me?

A. I have no doubt but what that is the same paper.

Q. It is; as a matter of fact, you know it to be the same paper?

A. No, sir; I do not.

Notice admitted to be the same one that was served, and is marked Exhibit P, and offered in evidence as part of the cross-examination. A copy thereof is hereto annexed, marked Plaintiffs' Exhibit P.

Q. You took no steps to pay that $1,300 bill within the five days named here?

A. No, sir.

Q. You took no steps to furnish any cars?

A. No, sir.

Q. The first step you took concerning this fuel Co. was to put in your answer claiming these damages?

A. I don't know.

Q. As far as you recollect, you took no action towards liquidating the bill?

167 A. I didn't make any effort to pay it after that time.

Redirect examination:

Q. Mr. Brock, did you write to the Northwestern Fuel Co. in response to this notice, do you recollect?

A. I don't remember whether I did or not; I think I did.

Q. Look at that letter, and see if you wrote it to Mr. Saunders in response to his notice.

A. Yes, sir.

Letter here offered in evidence, marked Exhibit Q. A copy thereof is hereto annexed, marked Defendants' Exhibit Q.

Recross-examination:

Q. You wrote this yourself?

A. I did.

Q. Was it dictated to you by anybody?

A. My partner and I might have consulted in regard to how to answer the letter.

Q. As a matter of fact, wasn't this letter dictated by your counsel?

A. I don't think he was anywheres near me when I wrote it. I think I wrote that.

Q. Isn't it a matter of fact you were instructed as to the form of this letter, and that the same was dictated by your counsel? Are not the statements in there the advice of your counsel to you to write in that way?

A. They might have been in part.

Q. Didn't you write that letter in accordance with his in-
168 structions? Didn't you consult with him before you wrote? Didn't he advise you, and didn't you write, as near as you could recollect, just what he told you?

A. Very likely I did. I don't remember particularly.

Objected to as immaterial, and objection overruled.

Letter marked Exhibit Q here read in evidence by defendant's counsel.

Redirect examination:

Q. I will ask you, Mr. Brock—you speak of enclosing a copy of your letter to Mr. Foster. State whether or not it was a copy of this letter to Mr. Foster marked Exhibit E.

A. I am unable to say.

Q. Well, you say here: "Permit us to call your attention to the enclosed copy of our letter of the 15th inst. to your agent, Mr. Foster, of this city." What is the date of that letter?

A. December 15.

Q. Did you write Foster any other letter on that day?

A. I don't think I wrote him but one letter on that day.

Q. Did you enclose a copy of a letter with this?

A. I think I did. I have no doubt but what that is the letter, but I could not say positively.

Defendant here offers in evidence the letter of December 15 (Exhibit E) in evidence as a part of the correspondence between Brock & Saunders.

169 Objected to by plaintiff as immaterial; objection sustained, and defendant excepts.

Q. Mr. Brock, you have been interrogated on cross-examination as to whether you ordered 12 car-loads a day the latter part of November. I think you said that your judgment was that you did not?

A. I presume that we did not.

Q. Why didn't you?

A. Because we had numerous orders in previous that were not yet filled.

Q. I think you have stated you were ready to receive 12 car-loads a day?

A. Yes, sir.

Q. Mr. O'Brien had also asked you if you did anything in regard to securing cars or paying this bill after Mr. Saunders' notice, and you say that you did not. Why was that?

Objected to as immaterial.

Q. Was this on account of the refusal of the company to furnish you any more coal and the letters of Mr. Foster of the 3d and 5th of December?

Objected to as immaterial; objection overruled.

A. Yes, sir.

Witness dismissed.
Defendant rests.

Thereupon on the part of the plaintiff the following testimony was introduced:

170 E. J. FOSTER sworn, and examined by plaintiff:

Q. Did you hear the testimony of the defendant, Mr. Brock, on yesterday and to-day in relation to a conversation with you at your office, at Cedar Rapids?

A. Yes, sir.

Q. Do you remember the occurrence of such conversation?

A. I do.

Q. Did you hear the testimony of Mr. Brock as to that conversation that no question was raised as to cars or transportation?

A. My recollection was that yesterday he stated that.

Q. You heard that yesterday?

A. Yes, sir.

Q. State what was the fact—what was that conversation between you and him relating to cars at that time.

A. He called at my office and asked why he was not getting coal.

Q. When was that?

A. It was in the latter part of November—I could not state the exact date—and he wanted to know why he was not getting it, and I told him that we had not been able to get any cars; that he had not procured any cars, and that we had not been able to get cars to fill his orders.

Q. What else did you say in relation to cars?

171 Q. Well, I told him that we had tried to get cars for

his coal trade down there continually, and used every exertion to do so, and that although I had not been able to succeed up to that time that I would still continue to try and get them; that if I did succeed I would fill his orders.

Q. What, if anything, did you say to him relating to his procuring cars?

A. I told him that it would be necessary for him to procure them if he expected the orders filled.

Q. Did you hear his testimony in relation to your saying that he had violated his contract, and that you would not put your hand in the fuel company's pocket and take their money?

A. Yes, sir.

Q. What is the fact in relation to that?

A. He inferred, to the best of my recollection—he inferred that his orders should have been filled, and I tried to explain to him why they had not been, and he was quite angry and quite unreasonable, and all I could say was what I repeated a few moments ago, that I had and would do all I could to fill his orders.

Q. Did you tell him that you would not fill his orders under any circumstances?

A. I did not.

Q. Did you state that you would not put your hand in the fuel company's pocket and fill his orders, because the price was too low?

172 A. No, sir.

Q. Did you give him to understand in any way that you refused to fill those orders if he procured the cars?

A. No, sir; on the contrary, I told him I would gladly furnish the coal if I could do it and he would furnish the cars to do it with.

Q. Were you familiar at that time with the price of coal in the market at the What Cheer mine?

A. I think I was; yes, sir.

Q. What was the market price at that time to parties furnishing the transportation—lump coal?

A. It run all the way from $1.50 to $1.65 and 75 cents, but I do not remember anything in any quantities above $1.65, to parties that agreed to furnish the cars.

Q. How was it in regard to parties buying coal in 12-car lots?

Objected to as incompetent and not throwing any light on the measure of damages; objection overruled, and defendant excepts.

Q. What was the price of coal in lots of 12 car-loads a day?

A. I should say $1.65.

Q. Did you ever know during the period involved here of any higher price than that being paid?

A. Not in quantities of that size.

Q. You are pretty familiar with the condition of things at

173 What Cheer and the capacity of the mines and the method of their operation at that time?

A. Yes, sir.

Q. State whether or not a party could have procured from other

sources at What Cheer than the What Cheer mine at that time any quantity of lump coal that he wanted at the price you have stated.

Objected to as immaterial, incompetent, and calling for collateral matter; objection overruled.

Q. State whether there were other mines that he could have procured all he wanted.

A. I could not answer that. If you say any quantity there would be a limit to that.

Q. Well, to the amount of 12 cars a day?

A. Yes, sir.

Q. And more?

A. Yes, sir.

Q. If he furnished the cars for it?

A. Yes, sir; that was the trouble in the whole Territory. We had lots of coal and no cars.

Q. Who was present at this conversation, if anybody, between you and Mr. Brock?

A. Mr. Vincent was present.

Cross-examination:

Q. At what other mines could coal have been procured during the period covered by this contract, say from December 1st, 1881, to July 1st, 1882?

A. Well, the Muscatine people could have furnished it; there were two mines.

174 Q. Well, you take a breath there. Don't you know it to be a fact that the Northwestern Fuel Co. were buying all the coal from the Muscatine mine?

A. At what date do you refer?

Q. From November to July.

A. I know that they were not.

Q. Well, now, go on.

A. I stated that at the time—at the date this question is called for——

Q. What other mines? is the question.

A. That is what I am getting at. The Muscatine mine, the Rosetta mine, or the Star A mine, and almost that amount from the Star B mine, half of that amount from Mr. Club—at least a third of that amount—and a like amount from Mr. Blatt.

Q. Were the mines of Mr. Club and Mr. Blatt on any switch or railway?

A. No, sir.

Q. How were they reached?

A. Reached by wagon. They hauled about 75 or 100 yards—one of them a little further—a half mile. This, I understand, was a question of production.

Q. Did you make any transaction during that time of selling coal on the track there, on the cars, at the rate of 12 cars per day?

A. Do you mean closing any deals during that time—during the month of November?

Q. From December to July following.

175 A. To the best of my recollection, I did. I could not locate them now. I made a great many.

Q. To whom?

A. Well, I cannot call the firm names.

Q. Was it in every instance to patrons of the Northwestern Fuel Company in the northwestern territory that Mr. Saunders has described?

A. That I made sales? I didn't make sales to the patrons of the Northwestern Fuel Co. that I know of. They became my patrons when I made sales to them.

Q. Had you any authority to make sales except for the Northwestern Fuel Co. during that period of time?

A. To make sales for other parties?

Q. Yes, sir.

A. Yes, sir.

Q. What other parties?

A. I had authority to make sales for the Star Coal Company.

Q. Outside of the sales to Mr. Saunders?

A. Yes, sir.

Q. Now, I understand you to say, Mr. Foster, that in this conversation with Mr. Brock you told him that you had tried to get cars for him and for your other patrons and could not do it. Did you tell him that?

A. I did; yes sir.

Q. That you had tried to get cars for him?

A. I did; yes, sir.

Q. Had you tried to get them?

A. Yes, sir; I did.

Q. And that you were trying?

176 A. I did.

Q. And you conceded then rather that you ought to try, didn't you?

Objected to.

Q. Now, that conversation, I understand you, took place last of November?

A. Yes, sir; the latter part of November.

Q. About what date?

A. Well, it was along between the 25th and 28th. I think somewhere in that vicinity. I cannot tell exactly when it was.

Q. Did you see him again before you wrote this letter of December 3rd?

A. I told him in that conversation that I would advise him in regard to what I could do about cars, and also told him in that conversation that any communication I would have with him applied only to the car question.

Q. What did you mean by that?

A. Why, that I would see if any cars could be had. He accused me——

Q. As to applying only to the car question, did you mean that you would not receive orders for coal from him?

A. No, sir.

Q. Didn't mean that?

A. I told him that my objection to receiving more orders was that we could not fill what orders we had in, and it was placing the Fuel Co. and himself in bad shape for him to sell coal and
177 depend upon us to ship when we did not have anything to ship it in.

Q. If you told Brock in that conversation that you had tried and would try to get cars for his orders, how did you happen to write him on the 3rd of December, without seeing him again, that "at present your entire tonnage was placed elsewhere and orders from him were respectfully declined?"

A. For the best of reasons. First, that I had told him, and thought that he understood it, that it would be bad policy for us to accept his orders when we could not fill the back ones.

Q. Did you mean by this letter that you would not receive any further orders from him?

A. No, sir; that letter applies — and was part of the conversation between us.

Q. I have got no answer to my question. Now, by the letter of December 5th you said, "I have placed all my product for the present, and respectfully refer you to my letter of the 3rd, which is conclusive?"

A. Yes.

Q. Your letter of the 3rd was that orders *order* from him were declined; did you mean that your letter of the 5th was conclusive on that question?

A. Unless he sent the cars we could not send him any more coal.

Q. Did you say anything in the letter of the 5th about his sending the cars?

A. That was a continuation of our conversation.

178 Q. That was a continuation of your conversation. Did you mean this letter of the 5th as a termination of the contract? Did you mean to say to him that he could have no more coal by it?

A. No, sir.

Q. You meant to say by it that he could have coal if he would go and *and* furnish cars and transportation.

A. Yes, sir; that was my understanding—that was the instructions that I had.

Q. I will read the letter: "I gave orders to load such cars as you might furnish until I gave orders to the contrary, knowing at the time that you had no claims for the same and had forfeited your contract in more than one particular. Had I waited for you to furnish transportation for the product of this mine my company would have entailed a heavy loss, as you have not furnished a car that I know of up to date. I *I* told you my view of this matter several days ago, and since that time have consulted with our president." Who was that?

A. The wording of that might lead persons astray. That was Mr. Saunders I referred to.

Q. "Who has left the adjustment entirely with me."

A. The car question.

Q. I don't see anything about cars.

—. That is part of the conversation.

Q. "During the time of your utter failure to procure cars
179 for what I might have furnished you with I have placed all my product for the present, and respectfully refer you to my letter of the 3rd, which is conclusive."

A. Yes, sir.

Q. Did you ever intimate to Mr. Brock that you would furnish him any coal?

A. I never had any authority to stop furnishing coal.

Q. Did you intimate to Mr. Brock that you would furnish him any coal?

A. I never had any authority to stop furnishing coal.

Q. Did you intimate to him that you would furnish him coal?

A. Mr. Saunders took the matter up then.

Q. Mr. Foster, how many car-loads was the Northwestern Fuel Co. taking out *at* of What Cheer product during the month of November?

Objected to as not cross-examination.

A. It would be impossible for me to answer that question.

Q. Tell me, as near as you can, sir.

A. I am sure I could not come within ten cars of it.

Q. Come within ten cars. You had the general superintendence of it, hadn't you?

A. I was mixed up with the management of it. I should say 30 or 35 a day.

Q. How many during the month of December?

A. Well, I could not tell. There is a time—there was a portion of that time—that we were completely laid down in that terri-
180 tory, because we were blocked with loads; we were idle for nearly ten days, but I can't recollect when that was.

Q. Excluding that ten days, at what rate were you taking coal out at that time?

A. For the fuel Co.

Q. For the Northwestern Fuel Company?

A. I should think 30 or 35 cars a day.

Q. Through the winter?

A. Yes, sir; but I could not be positive on that point. It is too large a tonnage for me to recollect.

Redirect examination:

Q. You were asked, a moment ago, whether you meant by your letter when you said orders were declined and that you would let him have no coal—what did you mean?

A. I meant we could not fill his orders and give him more coal until we got some cars to ship it in.

Q. Did you give him to understand that you would not let him have coal if he would give you cars?

A. No, sir.

Q. Would you, as a matter of —, have done so?

A. That was my instructions, and I could not have done anything else.

J. A. VINCENT sworn for the plaintiff:

Q. Where do you reside?

A. Cedar Rapids.

Q. What is your business?

A. I am general agent of the Star Coal Company now.

181 Q. Are you familiar with the mines at What Cheer that are under investigation here?

A. I am.

Q. Are you the Mr. Vincent referred to by Mr. Foster as being present at a conversation that took place between Mr. Foster and Mr. Brock in the latter part of December?

A. Yes, sir.

Q. Did you hear Mr. Brock's testimony here?

A. I did.

Q. State what was said at that conversation in relation to cars, if anything.

A. Mr. Brock came in and was very angry over the matter of his orders not being filled, and Mr. Foster was quite the contrary, and told Mr. Brock that we were ready and would gladly fill his orders up to the amount of the contract if he could furnish the cars and would do —. He told him further that he would and had used all efforts possible to obtain cars, not only for our own mines but for the territory. We were short in our own trade very much.

Q. What, if anything, was said by Foster in that conversation refusing to let him have coal at all.

A. I did not hear anything of that kind at all.

Q. Was it said, to your knowledge—was he ever told—was it intimated to him that he could not have coal?

A. He was not told that at that interview, and never in my presence.

Q. On the contrary, he was told he could have coal if he would furnish the cars?

A. Yes, sir.

Q. Did you have an interview with Brock afterwards?

182 A. I did.

Q. How long afterwards?

A. I think this interview that is being spoken of was earlier in the month than the 20th. I think about the 27th or '8 Mr. Brock called and wanted some coal badly at Cedar Rapids.

Q. Was Foster present?

A. No, sir; and urged me to let him have some, if we could not let him have more than two cars, and I told him I would if it was possible to get any cars for Cedar Rapids to help him out; that I

would do so, and I did write our superintendent at the mines then and there, if he could get any cars, to ship him some coal.

Q. Did you ever refuse to let him have coal if he furnished the cars?

A. Never.

Q. Mr. Vincent, do you know what the market price at What Cheer was for coal—at which it could be bought loaded on the cars—to parties furnishing the transportation?

A. I think I do.

Q. Take it from December right straight along up to the end of this contract, what is the price?

A. I think any one could have purchased coal that would have furnished cars, which was a valuable consideration, to that territory, in 10 or 12 or 15 car lots per day, at $1.55 to $1.65.

Q. During the entire time?

A. Yes, sir.

Q. Per ton, you mean?

A. Yes, sir.

183 Q. Now, then, at what price could nut coal have been obtained in car-load lots?

A. We sold nut coal at one dollar a ton that winter—a great deal.

Q. Was it any higher in price during the time I speak of than that?

A. Yes, sir; it ranged from one dollar to $1.40.

Q. Could that have been obtained in any quantities necessary at that price?

A. No, sir; it could not. It was not—we only get one car of nut to eight of lump.

Q. You say it ranged from one dollar to $1.40?

A. Yes, sir.

Q. Now, state whether or not the mines at What Cheer, other than the What Cheer mine, could have produced 12 cars a day to the man that would furnish the transportation at the prices you have named.

A. Very easy.

Cross-examination:

Q. You spoke of writing to the superintendent, Mr. Gilfoy?

A. No, sir; I did not write Mr. Gilfoy. He was not our superintendent.

Q. Who did you write to?

A. Mr. Foster.

Q. Mr. Harry Foster?

A. Yes, sir.

Q. To let Mr. Brock have coal?

A. Yes, sir.

Q. What was Mr. Harry Foster?

184 A. I was going to help Mr. Brock out if we could any way. I had no authority to write to Mr. Gilfoy.

Q. What was Harry Foster's position?

A. President—superintendent of Star Coal Co.

Q. Not of the What Cheer Co.?
A. No, sir.
Q. Did you write in you own name or in the name of E. J. Foster?
A. E. J. Foster.
Q. You were clerk in his office at that time?
A. Yes, sir.
Q. You are now secretary of the Star Coal Co.?
A. No, sir.
Q. What is your office?
A. General agent.
Q. Did you hear more than one conversation between Mr. Brock and Mr. E. J. Foster in November?
A. No, sir.
Q. What did your coal sell for in market at What Cheer, on the cars, where you furnished them, during this period?
A. In large quantities, at $1.53 and $1.65.
Q. You furnishing the cars?
A. No, sir.
Q. Where you furnished the cars what did it sell for?

Objected to as immaterial; objection overruled.

A. It varied according to the quantity sold.
Q. By the car-load?
185 A. By single car-loads, I think, in November, that we got $1.87 & ½.
Q. What through the winter?
A. In December, my recollection is that it was two dollars.
Q. How much through the rest of the winter?
A. I think January and February was $2.25.

Redirect examination:

Q. That is applicable only to one-car lots—broken lots.
A. That is all.

H. A. FOSTER sworn, and examined by plaintiff:

Q. Mr. Foster, you reside where?
A. In Boone county, Iowa.
Q. During the fall and winter of 1881–'2, the period covered by this controversy, where were you living?
A. At What Cheer, Iowa.
Q. What was your occupation there?
A. I was superintendent—part of the time president and part of the time superintendent of the Star Coal Co.
Q. Were you, from November to July, familiar with the price of coal at that point in the market?
A. No, sir.
Q. Were you at any time?
A. I was from November to the 1st of January and the 13th of January.
Q. During that time what was the market price for lump

186 coal in large lots—say 10 or 12 cars a day—to parties furnishing cars.

A. On stated contracts from $1.50 is the lowest—from that to $1.55 per ton; that is the highest I know of any large contracts being made.

Q. State whether or not during that period it was possible for one furnishing the transportation to obtain lump coal at the rate of 12 cars per day if he furnished cars for it from other mines than this What Cheer mine belonging to the Star Coal Co.

A. Yes, sir.

Q. Would there be any difficulty in obtaining it?

A. Not at all if transportation was furnished.

Q. Take, for instance, the Star Coal Co.; how much could you furnish to parties furnishing transportation?

A. I could have furnished, over and above what I was furnishing, the 12 cars per day during the latter half of December and of November.

Q. What other mines were there?

A. The Muscatine, the Rosetta, Club, and Blatt. I think from Clubb and Blatt it would range as high as $1.60 on account of the hauling to the track.

Q. What was the price of nut coal, Mr. Foster, under like terms?

A. Nut coal in November was almost impossible to sell. We sold it, and it was offered by other parties, where transportation was
187 furnished, at one dollar per ton for the retail trade, in single car lots. Where we got B., C. R. & N. cars and sent it out it would range from $1.25 to $1.40.

Q. How about nut in December and January, during the time you speak of, up to the 13th of January?

A. The same condition in regard to nut continued.

Q. The same price?

A. Yes, sir.

Q. I will ask you what is your present employment?

A. Managing mines of the Manitoba railroad in Boone county.

Witness dismissed.

Mr. SAUNDERS recalled for plaintiff:

Q. You heard the questions I asked the preceeding witness in relation to the price of coal?

A. Yes, sir.

Q. Will you please state whether you had knowledge of the condition of the market at What Cheer. Do you know at what rates coal could be bought for by parties furnishing cars?

A. Yes, sir.

Q. Please state.

A. We were buying it there ourselves from other parties, outside of this production of our own, at a dollar a ton for nut coal and $1.55 for lump, and the price of mining was a dollar at that time. When the price of mining was 81 and a half cents we got 12 and a

half cents less on the lump coal, and nut the same. That
188 was all we paid all the year from that time until this.

Q. It has been suggested here that you were absorbing the entire capacity and product of those mines at this time. Is that so?

A. No, sir; I did not, for the reason I was unable to get cars enough to do it.

Q. Had you been buying from the What Cheer Land & Coal Co. before you made this arrangement?

A. No, sir.

Q. So there were mines you did not buy from at all in operation?

A. Yes, sir.

Q. Were you buying any coal at all except from the northern market—I mean outside of Northern Iowa & Southern Minnesota?

A. No, sir.

Q. Didn't interfere with the market at all?

A. No, sir; under my arrangement I agreed not to distribute it into territory local to those points at all.

Q. Then you had no occasion to use any B., C. R. & N. cars?

A. Except such as the road were obligated to furnish me.

Q. Except under this contract of yours that they were obligated to furnish to run north?

A. Yes, sir.

Q. Your trade was through north of Minneapolis?

A. Yes, sir.

Q. Did not distribute to any other points?

A. No, sir.

Q. Did you have any cars except to use on the through
189 traffic going up north?

A. None at that time.

Q. What foreign cars did you use, if you used any—belonging to what road?

A. Northern Pacific, St. Paul, Minneapolis & Manitoba, Chicago, St. Paul, Minneapolis & Omaha were the majority of foreign road cars I procured to go there for coal. They all went north of St. Paul & Minneapolis.

Q. Now, Mr. Saunders, state whether or not you yourself had an interview with Brock along in December.

A. I did.

Q. About when was that?

A. My recollection is it was the 16th day of December.

Q. What was that interview; what took place between you; where did it take place?

A. In Cedar Rapids, at Mr. Brock's office.

Q. State what occurred.

A. I presented a bill for the coal that he owed us for and asked him politely to give me a check for it, and he declined and I asked him to state his reason for declining, and he said that we were not carrying out the contract to his satisfaction, and he claimed that he was not going to pay it until the contract was carried out to his satisfaction. I told him we were only too anxious to carry it out if he would only carry out his end of it and furnish us the transportation,

and the smooth and easy way to fix that was for him to pay
190 us and give us the cars to ship coal, but he positively declined to pay the bill.

Q. During that conversation you told him you would carry it out if he would give you the cars?

A. Yes, sir; I did.

Q. Were you ready and willing to do so?

A. Yes, sir.

Q. Were you always ready and willing to do it?

A. Yes, sir.

Q. Did he furnish you any cars?

A. No, sir.

Q. Now, were you able to procure any cars to furnish him with the coal—to ship the coal on?

A. No, sir; I was not.

Cross-examination:

Q. Did you ever try to secure any cars for Brock?

A. Individually I did not. I understand my agents did. I instructed them to use their best efforts to fill Mr. Brock's orders.

Q. Did you instruct them to endeavor to procure cars for him?

A. I don't know that I did absolutely instruct them to go to work and endeavor to procure cars.

Q. Did you suggest to them that you would like to have them procure cars for him?

A. I cannot say positively whether I did or not.

Q. You do not suggest to Brock at this interview?

A. I think I told Mr. Gilfoy—he was the only man that I gave any instructions to in the premises—that I wanted Mr. Brock to
191 have his coal up to the limit of his contract if it was a possible thing to give it to him, whether he furnished the cars or whether he could get them. I went to What Cheer and gave Mr. Gilfoy, who was the only man that was under the direction of the fuel Co. during this time directly, those instructions. Mr. Foster was not in my employ.

Q. I understood you yesterday to say, when you was on the stand, that you did not give Mr. Gilfoy any instructions.

A. I think you misunderstood me.

Q. Possibly I did. Was it your desire, then, that Mr. Gilfoy should secure cars himself for Mr. Brock's coal if he could do it?

A. Within his province there. It was not my desire that he should go outside and buy or hire cars.

Q. Did you tell him to do that if he could?

A. Yes, sir.

Q. Did you intimate to Mr. Brock, on the 15th of December, that you were trying to procure cars for him?

A. I can't say whether I brought that up to him or not.

Q. You were trying to terminate the contract then to get rid of it, wasn't you?

A. No, sir.

Q. Didn't you desire to do that?

A. No, sir.

Q. Do you mean to say that if Mr. Brock had paid that
192 1,300 dollars you would have made any effort to secure cars for him and deliver him his coal?

A. Certainly we would have made an effort to deliver him his coal.

Q. Would you have made an effort to procure any cars for him?

A. The same efforts we had been making would have been continued.

Q. That is what I thought. Now, as I understand you, you were anxious to procure all the cars you could for your Northwestern Fuel traffic proper?

A. The cars that went into the Northwestern Fuel Co. traffic proper were altogether different cars from any that Brock wanted.

Q. Were you anxious to procure all the cars you could for your Northwestern Fuel Co. traffic outside of Iowa?

A. Yes, sir.

Q. You were making efforts to do that?

—. ——.

Q. When did you contract with the B., C. R. & N. for their cars?

A. I cannot tell you the date of the contract now.

Q. Was it before or after our contract with the What Cheer Coal Company?

A. I think it was some time before.

Q. Could you get as many cars as you wanted?

A. The B., C. R. & N. never carried out their obligation to one-half its extent in furnishing cars required by my contract for their traffic.

Q. Are you claiming damages of them now at the rate of $1.75 a ton for failure to carry it out that winter?

193 Objected to; objection sustained.

Q. You have spoken of the price of coal where the person furnished the cars—the transportation. Do you know of any transactions where coal was sold on the cars, the vendor furnishing the cars?

A. No, sir; I do not.

Q. Didn't know of that?

A. No, sir.

Q. You didn't make any sales of that kind?

A. No, sir.

Redirect examination:

Q. Now, Mr. Saunders, could any of the cars which Mr. Brock would require in his business have been used in your northern trade?

A. No, sir; none of those procured in the north could have been used for that business.

Q. So your regular trade did not interfere with the local trade down there?

A. No, sir.

Q. The cars you used came from the north and went back?

A. Yes, sir.

Q. Now, *when* the cars that you contracted with the B., C. R. & N. for after you got the mine could you have used those in local traffic?

A. No, sir; I had no rights for any cars for local traffic whatever.

Q. You had to use them for through traffic?

A. Yes, sir.

Witness dismissed.

Plaintiff rests.

194 Thereupon, in rebuttal, the defendant introduced the following testimony:

R. G. BROCK called for defendant:

Q. Mr. Brock, you failed to get coal on this contract with the Northwestern Fuel Co. or assumed by them; did you visit What Cheer and make an effort to purchase coal there?

Objected to as not rebuttal; objection overruled.

A. Yes, sir.

Q. What effort did you make to procure coal there?

A. I visited various mines that the Star Coal Co. and Northwestern Fuel Co. did not control. I went to the Muscatine mines to procure coal from them. I went to the Rosetta mine to procure coal from them. They could not furnish any coal, for they had sold their product, except a small reserve for some home consumption, to either the Star Coal Co. or the Northwestern Fuel Co. The Muscatine mines had just got their track down to their mines—I think, loaded the first cars on the track the day I was there. I effected a contract with the superintendent of that mine for some coal, but that contract was never carried out, Mr. Gregg, the superintendent, told me.

Objected to.

Q. You didn't get any coal of that mine?

A. No, sir.

195 Q. What had you contracted to pay them if you had got it?

A. I don't remember what the contract price was. It was for a term of years. I then visited Mr. Blatt for coal—another mine that was situated away from the railroad track. That covered all that had track, I think. He was willing to sell me some coal. He could furnish me from one to three cars a day, he thought, at two dollars per ton. I bought it at two dollars per ton. I then visited Mr. Clubb—another mine situated same—I should think three-quarters of a mile over a hill from our tracks, and I bought some coal of him. He did not know how much he could furnish, but he would let me have what he could at two dollars per ton. I probably got, as near as I remember, five or six cars from him during the winter. There was no other party that I could find in What Cheer that could furnish us any coal.

Q. That was the buying price?

A. Yes, sir.

Q. After you got this coal and got it on the track, what was it worth?

A. We charged 25 cents a ton in addition.

Q. Did it sell for that?

A. Yes, sir; we could have sold an abundance of it at that figure.

Cross-examination:

196 Q. Mr. Brock, have you taken the trouble to subpœna or cause to be in attendance upon this court these gentlemen you claim you had those conversations with? Is there one of them here?

A. I don't think there is.

Q. Is there one of them nearer than What Cheer?

A. Not that I know of.

Q. So far as you know, it would not be possible to get one of them here in time to get his testimony?

A. I do not know. It would not be possible to get them here today; they could be got here the first of the week.

Q. You were aware of that when you went on the stand. Didn't you agree with those men to furnish transportation?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. And neither of those contracts were carried out?

A. No, sir. Which contracts do you mean?

Q. And they were to furnish transportation, were they?

A. That is usual with all shippers, so far as I know.

Q. That is not the question.

A. They were to get cars in the usual manner.

Q. I asked you whether those two men, in which you have given the particular times and dates and quantities—whether those men agreed to furnish transportation?

A. They didn't positively agree to furnish transportation.

197 Q. Did you agree to furnish transportation?

A. No, sir.

Q. This contract did not go to the question of transportation at all?

A. Yes; that matter was talked over. To make it short, we both agreed to do what we could to get transportation.

Q. And this contract was not carried out?

A. How?

Q. They did not deliver the coal?

A. I just stated that we bought the coal.

Q. I understood you to say that you made contracts with some and they could not carry it out.

A. That is the Muscatine. You stopped me on that.

Def't rests.

DEFENDANTS' EXHIBIT A.

Letter-head of the What Cheer Land & Coal Co.

WHAT CHEER, IA., *Nov.* 30, 1881.

R. G. Brock & Co., Cedar Rapids, Ia.

GENTLEMEN: All orders for coal received from you since Nov. 1st has been referred to E. J. Foster, sec'y Star Coal Co., Cedar Rapids, Ia., from and through whom all orders for coal must be made and any and all business pertaining to the mine here transacted.

On yesterday Mr. Palmer, in my absence and without in-
198 struction, forwarded for your account, I S, 116, 28,000 coal to Gibson & O'Brien, Le Mars, Ia. Hereafter no shipments of coal will be made except upon orders received from Star Coal Co., through Mr. Foster.

Yours very truly, SAM'L GILLFOY, *Sup't.*

DEFENDANTS' EXHIBIT B.

OFFICE OF STAR COAL COMPANY,
CEDAR RAPIDS, IOWA, *Dec.* 3, 1881.

Messrs. R. G. Brock & Co., city.

DEAR SIRS: Your several favors of Mr. Gillfoy are referred to me.

It would have been impossible to have filled these orders under any circumstances, as no transportation has been furnished therefor.

At present our entire tonnage is placed elsewhere, and orders are respectfully declined.

Yours truly, E. J. FOSTER.

DEFENDANTS' EXHIBIT C.

OFFICE OF STAR COAL COMPANY,
CEDAR RAPIDS, IOWA, *Dec. 5th*, 1881.

Mess. R. G. Brock & Co., city.

D'R SIRS: Yours of this date at hand. When I took charge of the mine of the What Cheer Land & Coal Co. I gave orders to load such cars as you might furnish until I gave orders to the contrary, knowing at the time that you had no claims for the same and had forfeited your contract in more than one particular. Had I waited for you to furnish transportation for the product of this mine my company would have entailed a heavy loss, as you have not furnished a car that I know of up to date. I told you my view of the matter several days ago, and since that time have consulted with our president, who has left the adjustment entirely to me—during the time of your utter failure to procure cars for what I might have favored you with. I have placed all my product for the present and respectfully refer you to my letter of the 3rd, which is conclusive.

199 Yours truly, E. J. FOSTER, *Sec'y.*

DEFENDANTS' EXHIBIT D 1.

This agreement, made the 13th day of July, 1881, at Cedar Rapids, Iowa, between the What Cheer Land and Coal Co., party of the first part, and Mess. R. G. Brock & Co., of Cedar Rapids, as second parties, witnesseth:

That, subject to the conditions following, the first party hereby agrees to furnish and deliver to said parties of the second part all the lump coal mined by said coal company at their mine, now in operation at What Cheer, Iowa, for the period commencing with the present date and ending July 1st, 1882, said coal and all coal herein agreed to be furnished to be loaded at the mines and delivered to said second parties at said mine upon cars to be furnished by said second parties. Said coal Co. hereby also agree to furnish in said manner and at said place to said second parties so much of the nut and slack coal as they shall mine during said period as said second parties shall order, all said coal to be weighed on the track scales of said company at mines, which weight shall in all cases be binding, except when shortage is certified by the station agent at the point of delivery of said coal by said second parties or by other reasonable and proper evidence. Said coal Co. agrees to make all
200 reasonable endeavor to increase the productive capacity of their mine to at least twenty cars per day at the earliest practical date, but the company shall not be responsible to said second parties for damages for their failure so to do or to operate said mine (or to maintain said mine at said capacity) resulting from inability to obtain laborers, or from strikes among miners, or by reason of accident or other cause beyond the control of said company. It is understood by said second parties that there is now existing between the said coal company and the Burlington, Cedar Rapids & Northern Railway Co. a contract for the furnishing of coal to said railway Co.

It is also understood that said coal company has agreed to furnish to parties at Iowa City all the coal needed for local trade at Iowa City. The contract made hereby is understood to be subject to said Burlington, Cedar Rapids & Northern Co. and to the right and privilege of said coal Co. to furnish to the local trade at Iowa City all the coal needed or required by said trade (not to exceed three cars per day till the mine produces fifteen cars per day).

And it is further agreed that when the product of said mine shall have reached the amount of twenty-two cars per day said coal company may, if it should so desire, sell to such customers as it may secure at any point not exceeding two cars per day of lump
201 coal (without the consent of said second parties), but so as not to interfere with customers already secured by said second parties; and, inasmuch as the agreement of said second parties hereinafter entered into does not require them to take the entire product of nut and slack coal produced at said mines, it is understood and agreed that said coal company is at full liberty to secure a market for said nut and slack coal, and that said second parties shall have a

right to demand of the first party the balance only remaining unsold of said quantities of coal and so as not to interfere with contracts existing prior to notice of said second parties of their need of all product remaining unsold after such notice; but said first party may not (except at Iowa City) furnish said coal at less price than here agreed without reducing rates to said second parties to such reduced prices. The second parties agree to take of and from said coal company, subject to the reservations and limitations above, all the lump coal mined by said company during such period and so much of the nut and slack coal as they can find sale for, said coal to be delivered to them on the cars at What Cheer, Iowa, in manner aforesaid; and they agree to pay therefor the following rates, to wit: During the months of April, May, June, July, August, and September, for lump, sixty-two and one-half cents (62½) per ton above
202 the cost of mining said coal (to with, the cost paid by said company to the miner, not including entry work), and during the remaining months of the year seventy-five cents per ton of two thousand pounds above cost of mining. They agree to pay for all nut coal taken by them the sum of one dollar and twenty-five cents ($1.25) per ton and for slack coal the sum of three dollars per car of twelve tons during said entire period; but the prices here made as to nut and slack are made with the following understanding and agreement, to wit: If the prices obtainable by said second parties for said classes of coal last named will enable them to make a reasonable profit on the same by payments to said coal company of four dollars per car of twelve tons for slack and one dollar and thirty-five ($1.35) — per ton for nut coal during the six months commencing October 1st next, then they agree to pay said company such advance. They agree to buy of said company all the nut and slack coal their trade demands up to the capacity of said mine to furnish the same, and they especially agree with said company that they will use their best efforts in securing sale of said classes of coal; payments for said coal to be made each month; the coal furnished during the month to be paid for in cash, at the office of the treasurer of the coal Co., on or before the 15th day of the month follow-
203 ing, and a failure so to pay may, at the option of the first party, terminate the contract on five days' written notice.

It is agreed that second parties shall not be liable to the first party by reason of their inability to furnish transportation for coal during periods of snow blockade or strikes on railways or resulting from accidents, nor by reason of their inability to secure cars upon which to load the coal. It is hereby mutually agreed between said parties that they will each use their best exertions to secure the cars necessary for their use in hauling the coal under this contract.

In witness whereof we sign our names hereto this 21st day of July, 1881.

THE WHAT CHEER LAND & COAL CO.,
By L. H. JACKSON, *Sec'y.*
R. G. BROCK & CO.

By consent of the parties hereto the supply of lump coal to be furnished to R. G. Brock & Co. for the remainder of the term of this contract is limited to 12 cars per day.

Nov. 7, 1881.

R. G. BROCK & CO.

The benefits of this contract on future shipments assigned to the Northwestern Fuel Co.

THE WHAT CHEER LAND AND COAL CO.,
By S. L. DOWS, *Pres.*
LEWIS H. JACKSON, *Sec'y.*

204 DEFENDANTS' EXHIBIT D 2.

DEC. 5, 1881.

E. J. Foster, city.

DEAR SIR: We are in receipt of your favor of the 3 inst. relative to coal from the What Cheer mine. We beg to assure you that you are in error on the question of transportation. We have and can secure cars to receive twelve car-loads of coal per day, which we are entitled to by our contract with the What Cheer Land & Coal Co. We ask for the coal on this contract. Are we to understand that you decline to furnish it and fulfill the contract?

Yours truly, R. G. BROCK & CO.

DEFENDANTS' EXHIBIT E.

DEC. 15, 1881.

E. J. Foster, Esq.

DEAR SIR: Your corrected statement for coal furnished us during the month of Nov.—am't 1,309.50—just received. We are and always have been willing and anxious to carry out our coal contract with the What Cheer Land & Coal Co. to the letter. This contract was assumed by the Northwestern Fuel Co. and repudiated by that Co. as soon as it secured the mines. For this reason we decline to pay over the balance claimed from us for coal on the 15th
205 inst. We claim the right to apply it on the very heavy damages we have sustained by being deprived of the coal supply guaranteed by our contract. At the same time, we want to carry the contract out in the future, and hope your company will conclude to do so, and there will be no trouble on either side.

Yours truly, R. G. BROCK & CO.

DEFENDANTS' EXHIBIT F.

Sam'l Gillfoy, Esq., What Cheer, Iowa:

Please ship James W. Spencer, Allison, Ia., 5 cars lump. The five cars that were ordered there were to fill for J. W. Spencer on orders that you had there already, and the above is five additional cars, making ten for him.

J. D. Allen, Le Roy, Minn.	1 car	lump.
Barnard San, Mason City, Ia.	6 "	lump this w'k.
A. S. Chadboarn, Vinton, Ia.	2 cars	lump.
Woodford, Wheeler & Co., Clear Lake, Ia.	3 "	"
C. N. Squire, Spencer, Ia.	5 "	"
R. G. Brock & Co., Cedar Rapids, Ia.	3 "	"
	2 "	nut.

We find some of your cars falling badly short. Car 6566, for instance, we have just unloaded, and it weighed out 26,230 lbs., and almost every car runs under 27,000 lbs. We see that Haskins & Callender's order has been in some time, and no shipments to them lately. They say there is plenty of (B., C., N.) cars down there,
206 and they want them loaded, as far as possible, in preference to other cars, as they need the other cars at other points.

Resp. yours, R. G. BROCK & CO.

DEFENDANTS' EXHIBIT G.

Nov. 17, '1.

Sam'l Gillfoy, sup't, What Cheer, Ia.

DEAR SIR: Please ship to—

Vinton Mill Co., Vinton, Ia.	1 car	lump.
To H. T. Paterson, Madison, D. T.	5 "	lump.
H. & P. Krehnke, Keystone, Ia.	2 "	"
R. G. Brock & Co., C. Rapids, "	1 "	nut for brewery.
H. E. Taylor, Fairfield, Minn.	2 "	lump.

And send us some lump and nut here soon—quick; at once.

We are of the opinion that we are getting a pretty good supply of nut coal, only it is so mixed with lump that it spoils it for that kind of trade. We would rather not have it mixed. Please do not send it to us in that way. Laying all joking aside, we are satisfied that we are getting too much nut in our lump coal. It injures the sale of it very much.

Yours truly, R. G. BROCK & CO.

207 DEFENDANTS' EXHIBIT H.

Sam. Gillfoy, Esq., What Cheer, Ia.

DEAR SIR: Please ship as follows:

Barrett & Son, Mt. Vernon, Ia.	1	lump.
Madall & Hinkley, Canton, D. T.	5	"
Ellis & Abbot, Grundy Center, Ia.	2	"
Mitchell & Bradly, Reinbeck, Ia.	2	"
B. Hantling, Cresco, Ia.	1	"

We see you are getting badly behind with your orders.

Yours truly, R. G. BROCK & CO.

DEFENDANTS' EXHIBIT I.

NOVE'R 22, '1.

Sam. Gillfoy, Esq., sup't, What Cheer, Ia.

DEAR SIR: Please ship—

C. O. Fisher, Center Point, Ia.	1	lump.
L. O. Fabeer, Dow, Iowa	1	"

Did Foster order you to-day to send us some coal here? His head man said he would. Don't fail to get off Barrett's car coal, of Mt. Vernon, Iowa, quick as possible. Their mill is idle for want of fuel.

Yours truly, R. G. BROCK & CO.

208 DEFENDANTS' EXHIBIT K.

Nov. 23, '1.

Sam. Gillfoy, Esq., sup't:

Please ship—

Schooley & Deemer, Holland, Iowa	2	cars	lump.
Bassett & Huntting & Co., Plymouth, Iowa	1	"	nut.
E. L. Bradburg, Taopi, Minn.	4	"	lump.
Brainerd & Gardner, Blooming Prairie, Minn.	4	"	lump.
Also ship us here	4	"	nut.

Resp. yours, R. G. BROCK & CO.
L.

DEFENDANTS' EXHIBIT L.

Nov. 26, '1.

Sam. Gillfoy, Esq., sup't, What Cheer, Iowa:

Bassett, Huntting & Co., Rudd, Iowa	1 car	lump.
Bassett, Huntting & Co., Rose Creek, Minn.	1	"
H. E. Taylor, Lakeville, Minn.	1	"
E. B. Willix, Dow, Iowa	6	"
J. A. Greene, Stone City, Iowa	3	"
F. A. H. Grenlick, Keystone, Iowa	2	"
Milo Stark, Conrad, "	1	"
Barnard & Son, Mason City, Iowa	10	"
Ballan & Gildersleve, Gault, Iowa	1	"
I. I. T. Graff, Good Thunder, Minn.	1	"

Resp. yours, R. G. BROCK & CO.
L.

209 DEFENDANTS' EXHIBIT M.

Nov. 28, '1.

Sam. Gillfoy, Esq., sup., What Cheer, Iowa:

Please ship—

Henry Slocum, Austin, Minn.	2	cars lump.
Smith Bros. & Co., Kensett, Iowa	2	cars lump.
Boyce & Jones, Center Point, Iowa	1	" "
A. Folsom, Le Roy, Minn.	1	" "
C. P. Turner, Rudd, Iowa	2	" "

Resp. yours, R. G. BROCK & CO.
L.

DEFENDANTS' EXHIBIT N.

NOVEM. 30, '1.

Sam. Gillfoy, Esq., sup't, What Cheer, Iowa:

Please ship as follows & send notice to us:

R. H. Hallenbeck, Tama City, Iowa (C. N. W.)	2	cars lump.
W. W. Cargill & Bro., Brownsdale, Minn.	2	" "
R. G. Parmly, Sioux Falls, D. T.	10	" "
Geo. Patrick, Goldfield, Iowa	2	" "
Barb Wire Co., Cedar Rapids, Iowa	1	" "
Williams Harvester Co., Cedar Rapids, Iowa	2	" "
	2	" nut.
E. B. Willix, Dow, Iowa	2	" lump.
Add to us here	2	" "
	2	" nut.

Respect. yours, R. G. BROCK & CO.
L.

210 DEFENDANTS' EXHIBIT O.

DEC. 1, '1.

Sam. Gillfoy, Esq., sup't, What Cheer, Iowa:

Please ship as follows and send notice to us:

F. J. Kean, Norway, Iowa	2	cars lump.
Bassett, Huntting & Co., Varco, Minn.	2	" "
Decorah, Iowa	1	" "
Steward & Meuller, Reinbeck, Iowa	2	" "

and oblige

Respect. yours, R. G. BROCK & CO.
L.

PLAINTIFFS' EXHIBIT P.

To R. G. Brock & Co., Cedar Rapids, Iowa.

GENTLEMEN: As provided in a certain agreement made by and between the What Cheer Land & Coal Company, of first part, and

yourselves, of second part, dated July 13, 1881, which said agreement was duly assigned to the undersigned of November 7, A. D. 1881, you are hereby notified that the Northwestern Fuel Co. has elected to terminate the said agreement and will so terminate it, provided the sum of thirteen hundred and nine $\frac{5}{100}$ dollars (the amount due said Northwestern Fuel Co. from you for coal delivered to you during the month of November, and payment of which was due, according to said agreement, on December 15th, 1881) is not paid to Blake & Hormel, attorneys for said Northwestern
211 Fuel Company, within five (5) days from the date hereof.

Cedar Rapids, Iowa, December 17th, 1881.

NORTHWESTERN FUEL CO.,
By E. N. SAUNDERS, *President.*

DEFENDANTS' EXHIBIT Q.

DEC. 19, 1881.

E. N. Saunders, Esq., pres't Northwestern Fuel Co., St. Paul, Minn.

DEAR SIR: We received a notice from you on Saturday, the 17th inst., to the effect that your Co. elected to terminate and would terminate our contract with the What Cheer Land and Coal Co. provided we do not pay Blake & Hormel the sum of $1,309.50 within five days from the date of said notice.

Permit us to call your attention to the enclosed copy of our letter of the 15th inst. to your agent, E. J. Foster, of this city.

You long ago, without the slightest excuse, repudiated and terminated said contract to our great damage. You do not now intimate that you will live up to it and carry it out if we make the payment demanded.

Yours respectfully, R. G. BROCK & CO.

212 The foregoing is all of the testimony introduced or offered on the trial of said cause, together with all offers of testimony made by either the plaintiff or defendants, the rulings of the court thereon, and exceptions thereto as the same occurred at the time on the trial of said cause.

Be it further remembered that upon the conclusion of the evidence in the case the defendants, in writing, requested the court to instruct the jury as follows:

1. There is in the pleadings in this case no claim on the part of the plaintiff that the contract in controversy was terminated by the failure of Brock & Co. to furnish cars for the transportation of the coal, nor is there any claim that plaintiff had the right to terminate the contract because Brock & Co. failed to furnish such cars. The testimony as to whether Brock & Co. furnished cars in November is not material or pertinent to any issue in the case, except as may have some bearing on the measure of damages if defendants are entitled to recover on their counter-claim.

Which instruction the court refused to give, and the defendant at the time duly excepted.

And the defendants at the same time, in writing, further requested the court to instruct the jury as follows:

213 2. The substantial controversy in this case is how the contract was terminated and whether such termination was right or wrong. On behalf of the defendants it is claimed that on the 3rd day of December, 1881, the plaintiff summarily and arbit-arily refused to deliver defendants any more coal; this the plaintiff denies. Now, if plaintiff did this, as shown by a preponderance of the evidence, the right of action in favor of Brock & Co. accrued from the time the contract was so repudiated, and Brock & Co. from and after that date were not required to furnish cars to receive the coal, for that would be a useless thing if plaintiff would not deliver it. The jury will bear in mind that defendant does not plead that it was justified in terminating the contract about December 3rd. It only denies that it did so, and the issue here is simply whether it did so or not. If it did so defendants are entitled to have their damages assessed for such repudiation of the contract.

On the other hand, plaintiff claims that it terminated the contract, as therein provided, for non-payment on the part of defendants for coal delivered in November.

The issue here tendered is not very material in any view of the case. Defendants do not sue for the termination of the contract in this manner, and if defendants have shown by a preponderance of the evidence that plaintiff, about the 3rd of December, had

214 repudiated and terminated the contract without just cause, then the plaintiff could not thereafter terminate a contract which it had itself repudiated, and the attempt to terminate on account of non-payment for November coal was wholly nugatory and cannot avail plaintiff in any way. So the really material question as to who broke the contract is this: Did or did not the plaintiff repudiate it about December 3d? If it did defendants are entitled to recover their counter-claim. If it did not defendants cannot recover.

Which instruction the court refused to give, and the defendants at the time duly excepted.

And thereupon the court upon its own motion instructed the jury as follows:

1. In this cause the plaintiff asks judgment against the defendants for the sum of $1,309.50 and interest as money due plaintiff for certain coal sold and delivered to defendants.

Brock & Co., the defendants, admit the indebtedness to plaintiff, but set up a counter-claim for damages against plaintiff, based upon an alleged violation of the written contract for the delivery of coal, which contract is declared upon by plaintiff. The question at issue and which you are called upon to determine arises upon the

215 counter-claim pleaded by defendants, the allegations of which are denied by plaintiff.

2nd. On the 13th of July, 1881, the defendants, Brock & Co., entered into a written contract with the What Cheer Coal Company for the delivery by the latter company of certain coal at the What Cheer mines upon cars to be furnished by Brock & Co.

This contract was, on the 7th day of November, 1881, assigned by the What Cheer Company to the Northwestern Fuel Company, and its terms were modified by providing that the supply of lump coal to be furnished to Brock & Co. for the remainder of the term of the contract was limited to twelve cars per day, the original contract providing for the delivery of the entire product of lump coal which the mine could furnish, subject to the fulfillment by the coal company of certain prior contracts entered into with the Burlington, Cedar Rapids & Northern R. R. Co. and with dealers at Iowa City.

It is also provided in said contract that the coal furnished during the month was to be paid for in cash on or before the 15th day of the month following, and that a failure so to pay at the option of the plaintiff would terminate the contract on five days' written notice.

It is not questioned by defendant- that the sum due for coal on the 15th of December, 1881, was not paid. That demand for pay-
216 ment thereof was made and refused, the defendant- claiming the right to set off the damages alleged to be due them for breach of contract against such sum, and that plaintiff gave the five days' notice for terminating the contract, in accordance with its terms, on the 17th day of December, 1881.

3. Under the terms of the contract you are instructed that the failure on the part of Brock & Co. to pay the sum due for coal previously delivered, as provided in said contract, gave the plaintiff the right to terminate the contract; and if the plaintiff determined to terminate the same, and gave five days' written notice thereof to defendants, the contract would thenceforth be at an end, and both parties would be released from further performance of its provisions.

4th. If, however, there had, previous to its termination, been a breach committed by either party of the obligations imposed by the contract, its termination would not prevent the party injured from now claiming damages for such breach.

5. On part of the defendants it is claimed that the plaintiff committed a breach of said contract to the damage of defendants in the sum of $20,000.00, in that whilst "the defendants furnished a sufficient number of cars at the mine named in said contract to receive and ship twelve car-loads of lump coal, as provided by said contract as modified, that the plaintiff, upon its part, made no
217 effort to secure cars to ship said coal, and from and after the 29th of November, 1881, neglected and refused to ship or deliver to defendants any coal whatever, and on the 3rd day of December, 1881, the plaintiff repudiated said contract and declined and refused to furnish defendants with any more coal whatever under the terms of said contract," and the same averments in substance are made regarding the nut coal required to be furnished under the contract.

6. On part of the plaintiff it is denied that defendants furnished the cars at the mine necessary to ship twelve cars of lump coal per day or to ship the nut coal under the contract, and it is denied that plaintiff ever refused or neglected to load any car furnished at the mine by the defendants.

7. Under the terms of this contract you are instructed that it was the duty of the defendants, Brock & Co., to furnish at the mine cars sufficient to load the nut coal ordered by defendants and twelve carloads of lump coal per day.

To comply with this obligation it would not be necessary for them to furnish just twelve cars, no more and no less, on each day. A substantial compliance is all that could be required of them; and hence if they averaged twelve cars per day, making up one day what might be short on another, so that they substantially furnished
218 on an average twelve cars per day, this would be sufficient compliance on their part.

8. If, however, the defendants failed to furnish the cars as required by their contract, then they wou-d be in fault on their part, and after that they could not, without performance on their part, expect compliance upon part of the plaintiff.

9. The issue made in the pleadings as construed by the court is the averment, on part of defendants, that they furnished the requisite number of cars, which is denied by plaintiff.

10. Now, if you find from the evidence that the defendants, Brock & Co., did furnish the cars necessary to ship twelve cars per day of lump coal on the average, as above explained, then on this issue you should find for Brock & Co., as it is admitted by plaintiff that it had coal to deliver if the cars were furnished; and so also, in regard to the nut coal, if you find that the cars were furnished by defendants, then this would justify you in finding for defendants on that issue.

11. If the cars were furnished it was the duty of the plaintiff to load them with the coal; and, as plaintiff admits that it had the coal and claims that it did load all cars furnished by defendant-, the sole issue to be determined by you is whether the defendants,
219 Brock & Co., furnished the cars called for under the contract. If they did, then your verdict must be for defendants upon the counter-claim.

If they did not furnish the cars, then they cannot recover.

12. If, under the instructions given you, you find for Brock & Co. on their counter-claim, you will then consider the amount of damages to which they may be entitled.

13. It was the duty of Brock & Co., when they found that the fuel Co. had failed to supply the full quantity of coal required by the contract, if they could by reasonable effort on their part procure the coal at What Cheer or vicinity, to do so; and their damages, in case they could procure the coal, would be the difference between the cost at which it could have been procured on the best terms reasonably to be had and the contract price they had agreed to pay to the fuel company.

14. The inquiry, therefore, is upon what terms could Brock & Co. procure the quantity of coal which the fuel company had failed to deliver between the 29th day of November, 1881, and the 22nd day of December, 1881, when the contract was terminated.

15. As Brock & Co. were obliged to furnish the cars needed to ship the coal under the contract with the fuel company, the query is,

What would it have reasonably cost them to procure the coal
220 at What Cheer, they furnishing the cars?

16. If you find from the evidence that if they, Brock & Co., had furnished the cars the coal could have been procured at a cost not exceeding the price agreed to be paid to the fuel company, then their damages would be merely nominal.

17. If, however, the coal, Brock & Co. furnishing the cars as provided for in the contract with the fuel company, would have cost a sum in excess of that agreed to be paid to the fuel company, then this difference in the cost over and above the contract price will constitute the damages to be awarded Brock & Co., to which should be added six per cent. interest from the time of the failure to deliver the coal.

18. If, however, the coal could not have been procured by Brock & Co., they furnishing the cars for it, then you must ascertain the fair market price of coal, such as is called for in the contract, at What Cheer from the 29th of November to December 22d, 1881, loaded upon cars furnished therefor at an average rate of twelve cars per day, and the excess, if any, of such fair market value over and above the contract price will constitute the measure of damages upon the lump coal.

19. The same principle of ascertaining the damages is to be applied to the nut coal, in case you find that there was a fail-
221 ure to furnish the same on part of the fuel Co., and is to be applied to the quantity of nut coal which you find the fuel company failed to deliver up to the 22 day of December, 1881.

The foregoing are all the instructions given by the court to the jury on the trial of said cause; and be it remembered that at the time of giving such instructions the defendants duly and separately excepted to the giving of paragraphs 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, & 18 thereof, and at the time duly and separately excepted to the giving of each of said paragraphs of said instructions.

And be it further remembered that the jury, having retired to deliberate — their verdict, afterwards, on the 23rd day of April, 1883, returned their verdict in said cause into said court as follows:

"We, the jury, find for the plaintiff in the sum of fourteen hundred and two dollars and forty-seven cents.

"$1,402.47. J. M. ROBERTS, *Foreman.*"

222 And afterwards, on the 15 day of June, 1883, the court rendered judgment in said cause upon the verdict of the jury in favor of the plaintiff and against the defendants for the sum of fourteen hundred and two $\frac{47}{100}$ dollars, with interest at 6 per cent. from April 23, 1883, and costs; to which judgment defendants then and there duly excepted; and thereupon, by consent of the parties, in open court, the defendants were allowed sixty days from the date of said judgment to settle their bill of exceptions herein.

And now, within the time so fixed for settling the bill of exceptions,

the defendants bring this their bill of exceptions and pray that it be signed and made a part of the record, which is accordingly done.

[L. S.] O. P. SHIRAS,
District Judge for Northern District of Iowa.

And which said bill of exceptions is endorsed as follows:

Northwestern Fuel Co. *vs.* R. G. Brock & Co. Bill of exceptions. Filed July 19, 1883. Alfred Hobbs, dep. clerk U. S. cir. c't, N. district of Iowa.

223 UNITED STATES OF AMERICA, } ss:
Northern District of Iowa, }

I, A. J. Van Duzee, clerk of the district and circuit courts of the United States for the no-thern district of Iowa, eastern division, do hereby certify that the foregoing is a true and perfect transcript of the record in the case of—

THE NORTHWESTERN FUEL COMPANY
vs.
R. G. BROCK & G. T. MCKENZIE. } No. 66. Law.

as fully as the same remains on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this 24th day of February, A. D. 1885.

[Seal Circuit Court U. S., Northern District of Iowa, Dubuque.]

A. J. VAN DUZEE, *Clerk*,
By ALFRED HOBBS, *Deputy.*

Endorsed on cover: N. Iowa C. C. U. S. No. 210. R. G. Brock and G. T. McKenzie, copartners as R. G. Brock & Company, plaintiffs in error, *vs.* The Northwestern Fuel Company. Filed December 17th, 1885.

Office Supreme Court, U.S.
FILED
MAR 8 1889
JAMES H. McKENNEY,
CLERK.

In the United States Supreme Court.

OCTOBER TERM, 1888.

No. 210

R. G. BROCK, ET AL.,
Plaintiffs in Error,

vs.

THE NORTHWESTERN FUEL COMPANY,

BRIEF FOR PLAINTIFFS IN ERROR.

By CHAS. A. CLARK.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

R. G. BROCK, ET AL.,
Plaintiffs in Error,
vs.
THE NORTHWESTERN FUEL COMPANY,
Defendant in Error.
No. 210.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

CHAS. A. CLARK, *for Plaintiffs in Error.*

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

The plaintiffs in error, who are co-partners, claimed in the court below $20,000 damages for breach of a written contract for the sale of coal to them.

This contract was originally entered into between them and the What Cheer Land and Coal Co., an Iowa corporation. It was, before the transactions in controversy, assigned in writing to the defendant in error, a Minnesota corporation, which, it is admitted in the pleadings, assumed in writing the obligations of the contract.

The principal contention in the court below and here was and is, whether Brock & Co., as a condition precedent to receiving the coal, were to furnish cars for it; and whether the Fuel Co. wrongfully re-

pudiated the contract, or rightfully terminated it for non-payment by Brock & Co. of coal delivered thereunder. Questions as to the measure of damages also arise.

Originally the contract provided for the sale to Brock & Co. of all the lump coal mined by the What Cheer Company, with certain reservations not important to be considered, and for such nut coal and slack as Brock & Co. might require in their business.

The term covered by the contract was from July 13, 1881, to July 1, 1882. On November 7, 1881, before it was assigned to the Fuel Company, it was modified by a written endorsement thereon, as follows:

"By consent of the parties hereto, the supply of lump coal to be furnished to R. G. Brock & Co. for the remainder of the term of this contract is limited to 12 cars per day.

Nov. 7, 1881."

And on the same day it was assigned to the Fuel Company. Within a month thereafter, and on Dec. 3, 1881, the Fuel Company in writing notified Brock & Co. that it would deliver no more coal under the contract, for the alleged reason that Brock & Co. had not furnished cars to receive the coal. (Record 100.)

December 5 Brock & Co. responded by letter to the Fuel Company, saying they had and would furnish the cars, asking for the coal, and saying: "Are we to understand that you decline to furnish it and fulfill the contract?" (Record 100.) To this the Fuel Company responded by letter of the same date from its admitted agent (Record 24), saying: "During the time of your utter failure to procure any cars for what I might have favored you with, I have placed all my product for the present, and respectfully refer you to my letter of the 3d, which is conclusive." (Record 100.)

After this Brock & Co. never received a pound of coal under the contract.

The coal they received in November amounted to $1,309.50, which, by the terms of the contract, was payable Dec. 15. Brock & Co. did not pay, because of the repudiation of the contract which they allege. The contract as to this provides:

"Payments for such coal are to be made each month; the coal furnished during the month to be paid for in cash at the office of the treasurer of the Coal Company on or before the 15th day of the month following; and a failure so to pay may at the option of the

first party (the Coal Company) terminate the contract on five days written notice." (Record 5.)

On Dec. 17, 1881, the Fuel Company gave notice under this clause of its option to terminate the contract, which it had already repudiated and broken, unless payment was made for the November coal within five days.

To this notice Brock & Co. responded by letter, saying:

"You long ago, without the slightest excuse, repudiated and terminated said contract to our great damage. You do not now intimate that you will live up to it and carry it out if we make the payment demanded." (Record 107.) To this the Fuel Company made no reply.

Thus the issues are, did the Fuel Company wrongfully annul and repudiate the contract, or did it rightfully terminate it for nonpayment for coal? And these are the issues covered by the pleadings.

II.

The claim of the Fuel Company, that furnishing cars was a condition precedent to be performed by Brock & Co. before they could claim coal under the contract, is the first question which arises. The first clause of the contract, after designating the parties, is:

"That subject to the conditions following, the first party (the Coal Company) hereby agrees to furnish and deliver to said parties of the second part (Brock & Co.) all the lump coal mined by said Coal Company at their mine now in operation at What Cheer, Iowa, for the period commencing with the present date and ending July 1, 1882; said coal and all coal herein agreed to be furnished, to be loaded at the mine and delivered to said second parties at said mine, *upon cars to be furnished by said second parties.*"

Then follows the body of the contract, not material to this controversy, and the final clause is:

"It is agreed that the second parties (Brock & Co.) *shall not be liable to the first party* by reason of their inability to furnish transportation for said coal during periods of snow blockade, or strikes on railways, or resulting from accidents, *nor by reason of their inability to secure cars upon which to load the coal. It is thereby mutually agreed between said parties, that they will each use their best exertions to secure the cars necessary for their use in hauling the coal under this contract.*" (Record 3–5.)

The state of the pleadings is this: The Fuel Company brought

suit in the court below for the $1,309.50 due for November coal. Brock & Co. admitted this indebtedness, and by their answer set up their counter claim for damages for breach of the contract, alleging:

"That on their part they kept and performed all the agreements and provisions in said contract contained, and that after the plaintiff (defendant here) received said contract and became bound thereby these defendants (plaintiffs here) furnished a sufficient number of cars at the mine named in said contract to receive and ship twelve carloads of lump coal, as provided by said contract as modified; that the plantiff (defendant here) upon its part made no efforts to secure cars to ship said coal, and from and after the 29th day of November, 1881, neglected and refused to ship or deliver to defendants (plaintiffs here) any coal whatever; and on the 3d day of December, 1881, the plaintiff (defendant in error) repudiated said contract and declined and refused to furnish defendants (plaintiffs here) with any more coal whatever under the terms of said contract, by means whereof," etc. (Record 10.)

The defendant in error, by its amended and substituted reply,

"Denies that defendants (plaintiffs here) furnished a sufficient number of cars at the mines named in that contract and as required to do by the terms of said contract, to receive twelve carloads of lump coal per day, or so furnished any cars whatever, except only such as plaintiff promptly filled for defendants and shipped to them or their order." Then follows a general denial of everything in the counter claim not affirmatively admitted. (Record 14.)

Thus the state of the contract and of the pleadings as to furnishing cars for the coal is set out above *in hac verba*.

It will be observed that Brock & Co., as to the matters in controversy, were substantially plaintiffs below, as they are plaintiffs in error here; and as a matter of convenience they will be spoken of as plaintiffs in this brief, and the Fuel Company will be designated as defendant.

In the determination of the question, as to whetherby the terms of the contract, the furnishing of cars for the coal was a condition precedent on the part of Brock & Co., the evidence showing the situation of the parties at the time the contract was entered into, and the practical construction which they gave to it in carrying it out up to the time of the alleged breach, is of first importance. The evidence is all preserved by the bill of exceptions.

It is shown without conflict that Brock & Co., at the time of

making and during the contract, resided at Cedar Rapids, where they were coal merchants; that the coal mine was situated near What Cheer, Iowa, over seventy miles from Cedar Rapids; that neither of the original parties to the contract owned nor controlled any cars; that a single line of railway—the Burlington, Cedar Rapids & Northern—was built and operated through What Cheer, with spur tracks extending to the mines; that the parties wholly depended upon this line of railway for the supply of cars; that the cars were run on the spur tracks to and from the mines by the switch engines of the railway company; that the course of business of the railway company was, so far as possible, to haul cars to What Cheer sufficient in number to meet the orders of its patrons, as indicated by their local agent there, and that this local agent received orders from the patrons of the road and distributed the cars to them; he thus received orders from the What Cheer and other mines and gave them the cars they wanted, or if there was a shortage of cars, as frequently occurred, he distributed the cars *pro rata* on the basis of the out-put of the mines; he would not receive orders or furnish cars for persons not doing business at What Cheer, but if he received orders from his superiors as to the special disposition of cars, he made such disposition of them as thus directed; that the general offices of the railway company were at Cedar Rapids, and that Brock & Co. were active with the proper officers there in securing the forwarding of cars to What Cheer, including certain empty cars of other railways, which Brock & Co. desired for transportation of coal which they received under the contract; that the agents of the What Cheer Coal Co. and the Fuel Company at What Cheer, were active until about the last of November in securing from the agent at What Cheer cars to be loaded for Brock & Co., and that the president of the Fuel Company gave them special orders to do this. The president of that company testified:

Q. Did you ever try to secure any cars for Brock?

A. Individually I did not. I understand my agents did. I instructed them to use their best efforts to fill Mr. Brock's orders. * * * * * * I think I told Mr. Gilfoy, who was the only man I gave any instructions to in the premises, that I wanted Mr. Brock to have his coal up to the limit of his contract, if it was a possible thing to give it to him, whether he furnished the cars or whether he could get them; and I went to What Cheer and gave Mr. Gilfoy, who was the only man that was under the directions of the Fuel Company during this time directly, those instructions. * *

Q. Was it your desire that Mr. Gilfoy should secure cars himself for Mr. Brock's coal, if he could do it?

A. Within his province there. It was not my desire that he go outside and buy or hire cars.

Q. Did you tell him to do that if he could?

A. Yes, sir. (Record 96.)

Mr. Foster, the admitted agent of the Fuel Company, who wrote the letters repudiating the contract, testified:

Q. Now, I understand you to say, Mr. Foster, that in this conversation with Mr. Brock you told him that you had tried to get cars for him and for your other patrons, and could not do it? Did you tell him that?

A. I did, yes, sir.

Q. Had you tried to get them?

A. Yes, sir, I did. (Record 88.)

Samuel Gilfoy, who was superintendent for the What Cheer Coal Company mine during the time that company operated it under the contract, and was also superintendent under the Fuel Company, testified as follows:

Q. Now, as you had transacted business under this contract prior to November, had the practice been for Mr. Brock to designate to you the points to which he wanted cars sent, and you in shipping his coal to bill them to that point for him?

A. That was my instructions when I was operating for him.

Q. I didn't ask your instructions; I asked if that was the course of business between you?

A. Yes, sir (Record 44.)

Q. Was the business of furnishing cars for Brock conducted the same prior to the Northwestern Fuel Company taking the mine, that it was afterwards up to the time that you were instructed not to furnish him any more coal unless he supplied you with cars?

A. Yes, sir.

Q. You did try to get cars for him up to the latter part of November?

A. I did.

Q. And then you quit?

A. Yes, sir.

Q. And Mr. Foster, I believe you say, told you to quit?

A. Yes, sir, and told me that unless he furnished the cars for the coal that we would not ship him any more coal. (Record 46.)

Brock's testimony as to the manner in which the business was transacted under the contract is to the same effect. Being examined as a witness as to a conversation with Foster, after the claim of defendant that he must furnish cars, he testified:

"He (Foster) said we had not furnished the cars. I told him I understood that we had. He said we had not, simply sending the cars down to What Cheer did not furnish the cars to them, or something to that effect. I asked him if he expected me to come down there with a mule team and haul them to the mines. We had some conversation of that kind, as *we had been in the habit of sending the cars to What Cheer, and Mr. Gilfoy had always called for his cars there in accordance with our orders.* He claimed that we did not deliver the cars to him, consequently he did not load them." (Record 78.)

It is perfectly certain then that this is the manner in which the parties themselves construed the contract, and acted under it up to the time that the defendant determined to repudiate it, and furnish Brock & Co. with no more coal under it. How the claim came about that Brock & Co. must furnish the cars in order to receive coal is thus explained by defendants' own agents.

December 1 Brock & Co. sent Gilfoy an order for the shipment of coal, being Ex. "O." On this letter Gilfoy, who was superintendent, endorsed: "If E. I. F. instructs you to send this coal, send it. S. G." (Record 41.)

Gilfoy testified as to this memoranda with the letter before him as follows:

Q. Now, Mr. Gilfoy, isn't it a fact that prior to this time you had been instructed not to send any coal to Brock & Co., unless Foster authorized it?

A. Yes, sir, I had been instructed not to send any coal to any person.

Q. Unless Foster authorized it?

A. Yes, sir. (Record 41.)

Q. Now, isn't it a fact that Mr. Foster had told you not to send him, Brock, any more coal?

A. Well, no; not until about the 29th or 30th (November).

Q. Did he tell you then?

A. He told me not to send any more coal to Mr. Brock as long as the railway company wanted the coal, unless Mr. Brock furnished the cars.

Q. Did you notify Brock of anything of that kind?

A. I believe I did.

Q. When?

A. I couldn't state when it was.

Q. Now, in your letter that I have already introduced here you spoke of sending Brock a car load of coal on the 29th, and you say that it was sent in your absence, and without instructions?

A. Yes, sir.

Q. *You mean by that if you had been there you would not have sent it?*

A. *Yes, sir, I do.*

Q. *That was one car that got away from you and went to Brock?*

A. *Yes, sir.*

Q. *You didn't mean it should?*

A. *I didn't mean it should.* (Record 44.)

* * * * * *

Q. Will you explain that matter that your attention was called to? You said that one I. C. car went to Brock by mistake in your absence; how was that?

A. *I was directed about that time, perhaps a day or two or three before that, that unless Mr. Brock should furnish cars that we could not ship him any more coal.* (Record 46.)

Q. If that was so that Foster had told you not to try to get any more cars for Brock.—A. I didn't say that.

Q. Not to furnish any more coal unless he supplied the cars, *why didn't you tell Brock of that change in the business;* why did you simply tell him that his orders must come through Foster?

A. I tried to explain that once.

Q. I guess you havn't been asked about that.

A. I said the reason why I told him that his orders must come through Foster was that Foster had agreed to do that part of the business.

Q. That is not my question. *Why didn't you tell him that you would not try to get any more cars for him, that he must get his own cars?*

A. *I didn't think I had any right to tell him that.*

Q. Did Foster tell you to keep still about it?

A. No, sir.

Q. *You didn't inform Brock of that change in your purposes, you didn't tell him that you would not try to get any more cars?*

A. *No, sir*, and I didn't tell anybody else that I wouldn't try to get any more cars. (Record 47.)

Back of Gilfoy the manner in which it was determined to change the course of business under the contract, and deprive Brock & Co. of coal under it, was this:

Foster in his letter of December 5 to Brock & Co., Ex. "C," (Record 100), says: "I have consulted with our president, who has left the adjustment entirely with me."

Foster testifies as follows as to what then transpired, with this letter before him.

"He (the president, Saunders,) was down a short time before that. I could not state the exact date."

Q. How long before this letter was written?

A. Not very long. He was down the latter part of November, I think.

Q. Now, at the time you saw him, did you consult with him in regard to Brock's coal contract, and did he leave the adjustment of that matter entirely with you?

A. Only as to the loading of the cars *that Brock might send*.

Q. What instructions, if any, did he give you in regard to furnishing cars?

A. He gave none. Well, I might modify that a little; he told me to be sure and see that *all the cars Brock sent there* were loaded and billed as he directed. (Record 21-22.)

After this interview, and after the secret instructions to Gilfoy not to ship Brock & Co. any more coal unless they actually furnished the cars, contrary to the understanding and practice of all parties to the contract for over four months, Foster promptly wrote his letters of December 3 and 5, totally repudiating the contract under the pretense that Brock & Co. had violated it by not furnishing cars. And the Fuel Company now claims that furnishing cars should be held to be a condition precedent, to be shown by Brock & Co., before they can recover any compensation for being summarily deprived of their contract.

III.

Even if it should be held that furnishing cars for Brock & Co. is a condition precedent, the plaintiffs claim that it is admitted by the pleadings that they performed this condition.

As has been pointed out above, plaintiffs in their counter claim aver generally that they furnished the cars. The defendant, by its reply, merely negatives this allegation in general language.

The Code of Iowa regulating pleading provide:

Sec. 2701. "In all cases in which a denial is made by answer or reply, concerning a time, sum, quantity, or place alleged, the party denying shall declare whether such denial is applicable *to every* time, *sum, quantity*, or place, *and if not*, what time, *sum, quantity*, or place, *he admits*."

Sec. 2712. "Every material allegation in a pleading not controverted by a subsequent pleading; shall, for the purposes of the action, be deemed true. But the allegations of the answer, not relating to a counter claim, and of the reply, are to be deemed controverted. But an allegation of value, or amount of damage, shall not be deemed true by a failure to controvert it. A party desiring to admit any allegations, which by this section would be deemed controverted, may, at any time, file a written admission thereof."

Sec. 2714. "In pleading a judgment, or the determination of a court, or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made."

Sec. 2715. "In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts constituting such performance, but the party may state, generally, that he duly performed all the conditions on his part."

Sec. 2716. "A plaintiff suing as a corporation, partnership, executor, guardian, or in any other way implying corporate, partnership, representative, or other than individual capacity, need not state the facts constituting such capacity or relation, but may aver generally, or as a legal conclusion, such capacity or relation; and where defendant is held in such capacity or relation, a plaintiff may aver such capacity or relation in the same general way."

Sec. 2717. "*If either of the allegations contemplated in the three preceding sections is controverted, it shall not be sufficient to do so in terms contradictory of the allegation, but the facts relied on shall be specifically stated.*"

Under these sections plaintiffs claim that no specific facts are

pleaded showing that they did not perform all conditions of the contract as alleged, and that a mere denial, "in terms contradictory of the allegation," is a conclusive admission of what is alleged.

The court below held and charged the jury in substance that furnishing the cars by Brock & Co. was a condition precedent to their right of recovery, not only before, *but after the alleged violation of the contract by defendant, and its refusal to furnish more coal.* The plaintiff saved separate exceptions to instructions to this effect. (Record 110–111.)

The plaintiffs asked instructions upon the theory and basis that furnishing cars by them was not in issue, and that they were entitled to recover if defendant repudiated the contract as alleged; that they could not be required to make efforts to furnish cars after defendant broke and repudiated the contract. These instructions the court refused to give, and plaintiffs saved a separate exception as to each instruction refused. (Record 107–108.)

IV.

There was evidence tending to show that plaintiffs furnished cars up to the time defendant refused to perform the contract. There was evidence tending to show a summary and total repudiation and breach by the defendant, and a termination of the contract with notice from plaintiffs to defendant that it would be held liable for the damages which resulted. We shall not go into the evidence as to these matters in detail. The fact that the court submitted these questions to the jury is enough. It will be presumed that there was evidence upon which to base the instructions, and such was the fact.

But in submitting these issues to the jury the court charged that plaintiffs *could only recover damages up to December 22*, that being the date when defendant undertook to terminate the contract for payment for the November coal. *And the court further charged in effect that defendant could thus terminate the contract, even after it had broken and repudiated it, and after there was a total breach by reason of its own wrongful acts.* (See instructions Nos. 7 to 18, Record 110–111.)

As to these instructions defendants saved separate exceptions. (Record 111.)

V.

As to the measure of damages. Plaintiffs claim that if there was a total breach and repudiation of the contract, as they allege, they are entitled to recover as damages *the value of the whole contract*

from the date of its repudiation, and asked instructions accordingly. But the court below submitted to the jury the question whether there was such a breach of contract as plaintiffs claimed, and then *charged that defendant could terminate the contract, notwithstanding such breach; assumed that defendant had done so in fact, and absolutely limited plaintiffs' right of recovery to damages up to December 22, the date of the the alleged termination for non-payment.* (See instructions Nos. 7 to 18, Record 110–111.) Plaintiffs claim that herein was error.

The court also charged the jury *that it was the duty of Brock & Co. to purchase the coal elsewhere on the best terms possible, and made an effort on their part to do this a condition precedent to recovering any damages whatever; and only permitted plaintiffs to base their damages on the market value of the coal in the event that they had made reasonable efforts to purchase the coal elsewhere and failed.* (See instructions Nos. 7 to 18, Record 110–111.) Plaintiffs excepted to this and claim that herein was error.

These rulings of the court below resulted in a verdict and judgment for defendant, and plaintiffs bring the case here on writ of error.

VI.

QUESTIONS INVOLVED.

The questions for determination are:

1. Were plaintiffs bound as a condition precedent to their right of recovery to furnish the cars, or were both parties required to "use their best exertions" in this behalf, as the contract provided?

2. Were plaintiffs in any event required to furnish the cars after the defendant refused to deliver more coal?

3. If furnishing the cars by plaintiffs was a condition precedent, is it not admitted by the pleadings that they had performed this condition?

4. Could the defendant terminate the contract for non-payment and thus limit plaintiffs' recovery of damages, after repudiating and violating the contract in toto?

5. Did the court err in limiting plaintiffs' damages to December 22, even though the jury should find a total breach and repudiation by defendant as charged in the counter claim?

6. Should not the court have given the instructions asked by plaintiffs as to these questions?

7. Did the court err in charging that an effort to purchase the coal elsewhere was a condition precedent to plaintiffs' right to recover damages?

8. Did the court err in charging that plaintiffs could only recover damages based upon the market value of coal, upon the condition that they had made efforts to purchase the coal elsewhere on the best terms, possible and had failed?

VII.

ERRORS ASSIGNED.

Plaintiffs in error say there is manifest error on the face of the record in this:

I. The court erred in refusing to give to the jury said plaintiffs' first request or instruction, as follows:

"There is in the pleadings in this case no claim on the part of the plaintiffs that the contract in controversy was terminated by the failure of Brock & Co. to furnish cars for the transportation of the coal, nor is there any claim that plaintiff had the right to terminate the contract because Brock & Co. failed to furnish such cars. The testimony as to whether Brock & Co. furnished cars in November is not material or pertinent to any issue in the case, except as it may have some bearing on the measure of damages, if defendants are entitled to recover on their counter claim." (Record 107.)

II. The court erred in refusing to give to the jury said plaintiffs' second request or instructions as follows:

"The substantial controversy in the case is how the contract was terminated, and whether such termination was right or wrong. On behalf of the defendants it is claimed that on the 3d day of December, 1881, the plaintiff summarily and arbitrarily refused to deliver defendants any more coal. This the plaintiff denies. Now, if plaintiff did this as shown by a preponderance of the evidence, the right of action in favor of Brock & Co. accrued from the time the contract was so repudiated, and Brock & Co., from and after the date, were not required to furnish cars to receive the coal, for that would be a useless thing if plaintiff would not deliver it. The jury will bear in mind that defendant does not plead that it was justified in terminating the contract about December 3. It only denies that it did so, and the issue here is simply whether it did so, or not. If it did so, defendants are entitled to have their damages assessed for such repudiation of the contract.

"On the other hand, plaintiff claims that it terminated the contract, as therein provided, for non-payment on the part of defendants for the coal delivered in November.

"The issue here tendered is not very material in any view of the case. Defendants do not sue for the termination of the contract in this manner, *and if defendants have shown by a preponderance of the evidence that plaintiff, about the 3d day of December, had repudiated and terminated the contract without just cause, the plaintiff could not thereafter terminate a contract which it had itself repudiated, and the attempt to terminate on account of non-payment for the November coal was wholly nugatory, and cannot avail plaintiff in any way. So the really material question as to who broke the contract is this: Did or did not the plaintiff repudiate it about December 3? If it did, defendants are entitled to recover on their counter claim.* If it did not, defendants cannot recover." (Record 108.)

III. The court erred in giving to the jury on its own motion instructions, paragraphs seven, eight, nine, ten and eleven, as follows:

"7—Under the terms of this contract you are instructed that *it was the duty of the defendants, Brock & Co., to furnish at the mine cars sufficient to load the nut coal ordered by defendants, and twelve carloads of lump coal per day.*

"To comply with this obligation it would not be necessary for them to furnish just twelve cars, no more and no less, on each day. A substantial compliance is all that would be required of them, and hence if they averaged twelve cars per day, making up one day what might be short on another, so that they substantially furnished on an average twelve cars per day, this would be sufficient compliance on their part."

"8—If, however, the defendants failed to furnish the cars *as required by their contract*, then they would be in fault on their part, and after that they could not without performance on their part expect compliance upon part of the plaintiff."

"9—*The issue made in the pleadings as constructed by the court is the averment on part of defendants that they furnished the requisite number of cars, which is denied by plaintiff.*"

"10—*Now, if you find from the evidence that the defendants, Brock & Co., did furnish the cars necessary to ship twelve cars per day of lump coal* on the average as above explained, *then on this issue you should find for Brock & Co.*, as it is admitted by plaintiff that it had coal to deliver, if the cars were furnished; and so also in regard to the nut coal, *if*

you find that the cars were furnished by defendants, then this would justify you in finding for defendants on that issue."

"11—*If the cars were furnished* it was the duty of the plaintiff to load them with coal, and as plaintiff admits that it had the coal, and claims that it did load all cars furnished by defendant, *the sole issue to be determined by you is whether the defendants, Brock & Co., furnished the cars called for under the contract.* If they did, then your verdict must be for defendants upon the counter claim. *If they did not furnish the cars, then they cannot recover.*" (Record 110.)

IV. The court erred in giving to the jury on its own motion instructions, paragraphs thirteen, fourteen, fifteen, sixteen, seventeen and eighteen, as follows:

"13—*It was the duty of Brock & Co.*, when they found that the Fuel Company had failed to supply the full quantity of coal required by the contract, *if they could, by reasonable efforts on their part, procure the coal at What Cheer or vicinity, to do so, and their damages in case they could procure the coal, would be the difference between the cost at which it could have been procured on the best terms reasonably to be had,* and the contract price they had agreed to pay the Fuel Company."

"14—*The inquiry, therefore, is upon what terms could Brock & Co. procure the quantity of coal which the Fuel Company had failed to deliver between the 29th day of November*, 1881, *and the 22d day of December*, 1881, *when the contract was terminated.*"

"15—*As Brock & Co. were obliged to furnish the cars* needed to ship the coal under the contract with the Fuel Company, the query is what would it have reasonably cost them *to procure the coal* at What Cheer, *they furnishing the cars?*"

"16—If you find from the evidence that *if they, Brock & Co., had furnished the cars the coal could have been procured at a cost not exceeding the price agreed to be paid to the Fuel Company, then their damage would be merely nominal.*"

"17. If, however, the coal, *Brock & Co. furnishing the cars as provided for in the contract with the Fuel Co.*, would have cost a sum in excess of that agreed to be paid to the Fuel Company, then this difference in the cost over and above the contract price will constitute the damage to be awarded Brock & Co., to which should be added six per cent. interest from the time of the failure to deliver the coal."

"18. *If, however, the coal could not have been procured by Brock & Co., they furnishing the cars for it,* THEN *you must ascertain the*

fair market price of coal, such as is called for in the contract, at What Cheer, *from the 29th of day November to December* 22, 1881, *loaded upon cars furnished therefor*, at an average rate of twelve cars per day; and the excess, if any, of such fair market value over and above the contract price will constitute the measure of damages upon the lump coal." (Record 111.)

The court erred in giving to the jury on its own motion instruction, paragraph nineteen, as follows:

"19. The same principle of ascertaining the damages is to be applied to the nut coal, in case you find that there was a failure to furnish the same on part of the Fuel Company, and is to be applied to the quantity of lump coal which you find the Fuel Company failed to deliver *up to the 22d day of December*, 1881." (Record 111.)

VIII.

WERE PLAINTIFFS BOUND TO FURNISH THE CARS AS A CONDITION PRECEDENT TO RECOVERY?

1. By the very terms of the contract, both parties were bound "to use their best exertions to secure the cars necessary for their use in hauling the coal under this contract." Brock & Co. were "*not to be liable to the first party * * * by reason of their inability to secure cars upon which to load the coal.*" It will not do to say that they were not, under this clause, liable to the Fuel Company *in damages* for inability to furnish the cars, but were liable to the Fuel Company to have the contract repudiated on account of such inability on their part; thus putting it in the power of that company *to damage them* most oppressively without the intervention of a court.

It may be conceded that the first provision of the contract—that the coal is to be loaded and delivered "upon cars to be furnished by the second parties" (Brock & Co.)—would, without more, be a condition precedent. But it is modified by the subsequent clause, so that if Brock & Co. could not secure the cars, the Fuel Company was bound to do so if it could, and in no event were plaintiffs to be liable to the Fuel Company, either to be damaged by having their contract summarily repudiated, nor to respond in damages, for mere failure to secure cars. Such is the effect of the contract as a whole. The famialiar rule is, that the whole contract must be considered in its interpretation.

"Every clause and every word should, when possible, have assigned to it some meaning. It is not allowable to presume, nor to concede when avoidable, that the parties in a solemn transaction have

employed language idly. And this applies the same to the writing as a whole, as to its particular expressions.

Bishop on Contracts (Ed. 1887), Sec. 384, and authorities there cited.

And as held in a Massachusetts case by Shaw, C. J.:

"Where both parts of a deed may well stand together consistently with the rules of law, they shall be construed to have that effect rather than be held repugnant."

Corbin v. Healy, 20 Pick., 515.

In determining the question of a condition precedent, this court said, opinion by Mr. Justice Curtis:

"We do not deem it needful to review the numerous authorities, because *we hold the general principle to be clear, that covenants are to be considered dependent or independent, according to the intention of the parties, which is to be deduced from the whole instrument;* and in this case we find no difficulty in arriving at the conclusion, that the covenants were throughout independent."

Railroad Company v. Howard, 13 How., 239.

Looking at the contract in suit in like manner, "according to the intention of the parties, which is to be deduced from the whole instrument," it seems obvious that furnishing the cars by Brock & Co. cannot be held to be a condition precedent.

2. In determining this question the situation of the parties is to be considered.

"It is a fundamental rule that in the construction of contracts the courts may look not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made. Nash v. Towne, 5 Wall., 689; Barreda v. Silsbee, 21 How., 146, 161; Shore v. Wilson, 9 Cl. and Fin., 355, 555; McDonald v. Longbottom, 1 El. and El., 977; Munford v. Gething, 29 L. J. C. P. 110; Carr v. Montefiore, 5 B. and S., 406; Brawley v. United States, 96 U. S., 168."

Merriam v. U. S., 107 U. S., 441.

"The understanding of the parties may be shown from the nature of the transaction and the attending circumstances, as satisfactorily as from the language used."

The Confederate Note Case, 19 Wall., 559.

In this case neither parties owned or controlled cars. They

were to be secured from the railway company. Neither party had exclusive facilities for securing the cars. Each could aid: Brock & Co. at the general offices at Cedar Rapids where they resided; and the Coal Company at What Cheer where it transacted the business, and where the cars must be furnished by the local agent. Hence, although the contract first provides for loading the coal on cars to be "furnished" by Brock & Co., this means no more than cars they can secure from the railroad company. And hence, the subsequent provision that they are not liabile for inability to secure cars, nor absolutely bound to do so (as the first clause without more might imply); but that each party must "use their best exertions to secure the cars." From which it results that neither party can complain of the other until such exertions have been used, and the absolute burden of furnishing the cars is not a condition precedent as to Brock & Co.

This is the only reasonable construction in view of *all the language used*, and the situation of the parties.

3. As has been pointed out in the statement of the case, this was the practical construction which the parties themselves put upon the contract for more than four months, and up to the very time when defendant sought to annul it. This is a circumstance entitled to controlling force in construing the contract.

"In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, *the practical interpretation by the parties themselves is entitled to great, if not controlling, influence.* The interest of each generally leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by abitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one."

Chicago v. Sheldon, 9 Wall, 54.

"We think that *the practical construction which the parties put upon the terms of their own contract*, and according to which the work was done, *must prevail over the literal meaning of the contract*, according to which the defendant seeks to obtain a deduction in the contract price.

Dist. of Columbia v. Gallaher, 124 U. S., 510.

4. But there was evidence tending to show that Brock & Co. had actually furnished the cars, and upon its strict construction that this was a condition precedent, the court submitted this issue to the jury.

The plaintiffs requested the court to instruct that if defendant wrongfully repudiated and broke the contract, Brock & Co. "from and after that date were not required to furnish cars to receive the coal, for that would be a useless thing if plaintiffs would not deliver it." (Record 108.)

The court refused to give this instruction, but instructed in effect that plaintiffs were bound to furnish cars after such breach as well as before. (See instructions Nos. 7, 8, 9, 10 and 11, Record 110.)

The rule is familiar that the renunciation or annulment of a contract by one of the parties thereto, entitles the other party to maintain his action for the damages he has thereby sustained, and that the performance of conditions precedent on his part from the date of the breach is waived.

"This waiver is implied in all cases in which the party entitled to exact performance either hinders or impedes the other party in fulfilling the condition, or incapacitates himself from performing his own promise, or absolutely refuses performance, so as to render it idle and useless for the other to fulfill the condition."

Benjamin on Sales, Sec. 566.

"A positive, absolute refusal, by one party to carry out the contract, or his conduct in incapacitating himself from performing his promise, is in itself a complete breach of contract on his part, and dispenses the other party from the useless formality of tendering performance of the condition precedent."

Ib., Sec. 567.

On this question Lord Mansfield said:

"The party must show he was ready. If the other stops him on the ground of an intention not to perform on his part, it is unnecessary to go further and do a nugatory act."

Jones v. Barkley, 2 Doug. 634.

To the same effect are:

Rawson v. Johnson, East. 203.
Cort v. Railway Co., 17 Q. B., 127.
Smith v. Lewis, 26 Conn., 210.
Groves v. Donaldson, 15 Pa. St., 128.

As to tendering delivery of property in order to recover damages for breach of contract to purchase the same, after the vendee had given notice that he would not accept it, the supreme court of New Hampshire said:

"It seems to us entirely too clear for argument that no such useless, and at the same time burdensome ceremony could be required."

Haines v. Tucker, 50 N. H., 307.

This court has many times maintained the same rule.

Mr. Justice Story said:

"If a party to a contract who is entitled to the benefit of a condition, upon the performance on which his responsibility is to arise, dispenses with, or by any act of his own prevent the performance, the opposite party is excused from proving a strict compliance with the condition."

Williams v. Bank of the United States, 2 Pet., 102.

In a case where the defendant had agreed to pay for certain property, the value of which was to be ascertained by appraisement, and the defendant prevented this mode from being adopted, this court said:

"The company covenanted to pay this value to be ascertained in a particular mode, and as they have prevented this mode from being adopted, they cannot take advantage of their own wrong and deprive the plaintiff of the opportunity of showing to the court and jury what it is. In lieu of the award of the arbitrators the verdict of the jury can be asked by the plaintiff to determine it. The ascertainment of this value was the essence of the contract; the thing on which the submission was based, and the revocation of this submission leaves the jury to determine it."

Humaston v. Telegraph Co., 20 Wall., 28.

In a late case this court said, opinion by Mr. Justice Bradley:

"But surely, the willful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of the contract for which an action will lie for the recovery of all damage which the injured party has sustained. The distinction between those claims under a contract which result from a performance of it on the part of the claimant, and those claims under it which result from being prevented by the other party from performing it, has not always been attended to. The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred."

United States v. Behan, 110 U. S., 346.

In a later case it is said :

"Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated and demand whatever damage he has sustained thereby. We had occasion to examine this subject in the recent case of United States v. Behan, 110 U. S., 346, to which we referred. It is unnecessary to discuss it further here."

Lovell v. Insurance Co., 111 U. S., 274.

Where a party made a contract for the purchase of steel rails to be drilled as he might direct, and neglected and refused to give directions for the drilling, and also expressed his inability to pay for them, this court said, opinion by Mr. Justice Blatchford :

"The Circuit Court also finds that the defendant, by requesting the plaintiff to postpone the delivery of the rails, and by notifying the plaintiff that he was not ready to accept and pay for them, *excused the plaintiff from actually manufacturing them and tendering them to the defendant.* This conclusion is entirely warranted by the facts found, and, on those facts, the defendant must be held liable in damages."

Hinckley v. Pittsburg Steel Co., 121 U. S., 273.

Under these authorities the court below should have distinctly told the jury that if defendant had repudiated and refused to perform the contract as plaintiffs claimed, Brock & Co. were not thereafter required to perform the idle ceremony of furnishing cars for the coal in order to recover damages for the breach. But the court refused the plaintiffs' instruction to this effect, and left the jury to understand that plaintiffs must still supply the cars after defendant had renounced the contract in toto. As to all these matters, it is submitted there was error.

IX.

MUST PLAINTIFFS PROVE ALL THEY ALLEGE?

The court below placed its construction of the contract in part upon the pleadings, on the question of condition precedent. See paragraph 9 of instructions *supra*. By the Code of Iowa it is provided :

"Sec. 2729. A party shall not be compelled to prove more than necessary to entitle him to the relief asked for, or any lower degree included therein, nor more than sufficient to sustain his defense."

Plaintiffs averred that they had "kept and performed all of the

provisions in said contract contained," and also that they had furnished at the mine twelve cars per day on which to ship the coal; that defendants made no effort to secure cars, etc. (Record 12.)

It is obvious under this section of the statute, that if furnishing cars by them was not a condition precedent, plaintiffs were not bound to prove performance thereof by reason of what they had averred.

It was enough if they had used their best exertions, and defendants had used no efforts, and had arbitrarily refused performance on its part as alleged.

This section has often been construed by the supreme court of Iowa in accordance with this view.

"Where the petition alleges two states of facts upon either of which defendant would be liable, and some of its averments while material to one are redundant to the other, failure to prove the latter; where a right of recovery is established without such facts, will not defeat the recovery." Way v. Chicago, R. I. & P. Railroad Co., 73 Iowa, 463.

"Where the proof of an occurrance is made by statute presumptive evidence of liability, it is not necessary to prove negligence of the defendant in conection therewith, even though alleged in plaintiff's petition." Engle v. Chicago, M. & St. P. Railroad Co., 37 N. W. Rep. 6.

"The fact that plaintiff is allowed to recover without proving the entire facts alleged by him will not constitute error where his petition alleges the grounds necessary to entitle him to recover, and sufficient is proved to make out a cause of action." Little v. McGuire, 38 Iowa, 560.

Where in a suit in equity to foreclose a mortgage, the defendant pleaded that his notes were procured by fraudulent representation, *known by the payee to be false*, the supreme court of Iowa held that in equity the defense was made out *if the representations were false in fact;* and although there was a special finding in the case that the payee did not know the representations to be false, it was held that the defense was sustained. The court said:

"Although the defendant alleges in his answer that the representations of Blakeslee were false and fraudulent, and known to be untrue, yet he is required to prove only so much of these allegations as may be necessary to maintain his defense in the forum in which the action is pending." Citing the section of the statute above set out.

Sweezy v. Collins, 36 Iowa, 591.

See also:

Snyder v. Reno, 38 Iowa, 329.
Little v. McGuire, 38 Iowa, 560.
Knott v. Tincher, 39 Iowa, 628.
Edwards v. Cottrell, 43 Iowa, 194.
Kearney v. Fitzgerald, 43 Iowa, 590.
Mosely v. Shattuck, 43 Iowa, 540–3.

These cases fully sustain the views suggested above.

X.

PERFORMANCE IS ADMITTED BY THE PLEADINGS.

Under sections 2715 and 2717 of the statutes of Iowa, set out on page 10 of this argument, the defendant was required to *state specifically the facts relied on to show that plaintiffs had not performed the conditions of the contract as alleged by them.* This the defendant has not done. It has merely denied performance in vague and general "terms contradictory of the allegations" made by plaintiffs. This is tantamount to an admission of performance as averred by plaintiffs.

This court has already passed upon these sections of the Iowa statutes, in a case where performance of a condition precedent was alleged and denied generally, as in the case at bar; and it said, opinion by Mr. Justice Matthews:

"The denial of each and every allegation would certainly seem, *as far as words are concerned*, to put in issue the performance in this respect, as in every other, on the part of the plaintiff alleged in the petition."

But after considering these sections of the statute, and the decisions of the Supreme Court of Iowa under them, it is said:

"It follows, therefore, that the Circuit Court erred in its instructions to the jury that the alleged performance, on the part of the plaintiff below, of the condition of the contract which required a deposit of money in the Union Stock Yard National Bank, was a matter in issue and required proof; and in not instructing them, as requested by the defendant, that it was to be taken as a fact without proof, upon the admission in the pleadings."

Halferty v. Wilmering, 112 U. S., 714.

No distinction can be drawn between the pleadings in that case and the case at bar.

Since Halferty v. Wilmering was decided by this court, there have been further adjudications by the Supreme Court of Iowa in addition to those cited in that case.

The statutes of Iowa allow any citizen of a county wherein a place is kept for the sale of intoxicating liquor contrary to law to maintain a suit for an injunction as against a public nuisance. Citizenship of the county is a condition precedent to maintaining the suit. It is held that a general denial does not, under Sec. 2717, put the citizenship of such a plaintiff in issue.

Littleton v. Harris, 73 Iowa, 167.

Craig v. Hasselman, 74 Iowa, 538.

The court below expressly charged that the issue of performance *was made by the pleadings* (paragraph 9 set out *supra*); and that plaintiff *must prove performance* (paragraphs 7, 8, 10, 11 *supra*).

The court should have given defendants instructions *supra*, which assumed there was no issue as to performance. The record shows exceptions to the action of the court in this behalf. (Record 212–13.)

XI.

THE MEASURE OF DAMAGES.

There was evidence tending to show a total breach and annulment of the contract by defendant.

Brock testified that about Nov. 20 he had a conversation with Foster, in which Foster told him that the contract was not good for anything; and when asked why he did not furnish the coal, replied that they did not wish to, and gave as a reason *that he could make more money by placing the coal elsewhere, and proposed to do it; that he did not propose to put his hands in the pockets of the Fuel Company and give to Brock & Co.* (Record 24.)

After this Brock & Co. only received one car of coal (Record 45) *which Gilfoy says got away from him by mistake.* (Record 44.)

Dec. 3 Foster wrote the letter saying that orders from Brock & Co. were declined. (Record 100.) Brock & Co., Dec. 5, by letter, asked for coal on the contract, and said: "Are we to understand that you decline to furnish it and fulfill the contract?" (Record 103.) On the same day Foster replied: "I have placed all my product for the present, and refer you to my letter of the 3d, which is conclusive." (Record 100.) Brock says he considered the contract entirely abandoned and at an end. (Record 81.) When the Fuel

Company demanded payment for the November coal, and served notice to terminate the contract for non-payment, Brock & Co. wrote that company:

"You have long ago, without the slightest excuse, repudiated and terminated the contract, to our great damage." (Record 107.)

The plaintiffs were, therefore, entitled to have the case submitted to the jury on the theory of a total renunciation of the contract, as asked by their second instruction, set out in the assignment of errors *supra*.

The rule is as stated by this court in cases cited *supra*.

"The willful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself, a breach of contract for which an action will lie for the recovery of all damage which the injured party has sustained."

United States v. Behan, 110 U. S., 346.

"Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated, *and demand whatever damages he has sustained thereby.*"

Lovell v. Ins. Co., 111 U. S., 274.

Where a contract is thus terminated suit may be brought at once for the damages sustained, although the contract may, by its terms to have been performed in future by the party in fault. Suits for breach of promise of marriage furnish many familiar illustrations of this rule.

And when the contract is to buy or sell personal property in instalments, suit may be brought for the value of the whole contract as soon as their is a total renunciation or annulment, although by its terms the contract has months or years to run at the time suit is brought.

Where there was a suit on a contract which had about twelve years to run at the time of suit, it was held that damages for the entire term should be assessed.

Royalton v. Turnpike Co., 14 Vt., 311, 324.

And in a leading case of suit on a contract for the delivery of marble for a public building, *which contract could not have been fulfilled until two years after action was brought for damages for breach thereof,* it was held that plaintiff was entitled to recover as damages *the value of the contract at the date of breach*, to be determined with reference to

market values as of that date; or in the absence of market value, the constituent elements of the cost of the marble at that date, as compared with the contract price.

Masterton v. Mayor of Brooklyn, 7 Hill, 61.

One of the judges (Beardsley) held that damages should be assessed *with reference to prices during the term covered by he contract*, which was over-past at the time of trial. *But there was entire unanimity that from the date of the breach* plaintiff was entitled to his damages in full.

Nelson, Ch. J., said:

"Where the contract, as in this case, *is broken before the arrival of the time for full performance*, and the opposite party elects to consider it in that light, *the market price on the day of the breach* is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market *at the time the cause of action arose*, and not at the time fixed for full performance. The basis upon which to estimate the damages, therefore, *is just as fixed* and easily ascertained in cases like the present, *as in actions predicated upon a failure to perform at the day.*"

Bronson, J., said:

"There may have been fluctuations in the prices of labor and materials *between the day of the breach* and the time *when the contract was to have been fully performed;* and this makes the question upon which my brethren are not agreed. I concur in opinion with the chief justice, that such fluctuations in prices should not be taken into the account in ascertaining the amount of damages, but that the court and jury should be governed entirely by the state of things which exist at the time the contract was broken. This is the most plain and simple rule. It will best preserve the analogies of the law; and will be as likely as any other to do substantial justice to both parties."

On the other hand it was said by Beardsley, J.:

"If the cause had been brought to trial *before the time for completing the contract expired*, it would have been impracticable to make an accurate assessment of the damages. *This is no reason, however, why the injured party should not have his damage.* * * * * No rule which will be absolutely certain to do justice between the parties can be laid down for such a case. Some time must be taken arbitrarily at which prices are to be ascertained and estimated; *and the day of the breach of contract, or of the commencement of the suit,* should perhaps be adopted under such circumstances. But we need

not, in the present case, express any opinion on that point. No conjectural estimate is required to ascertain what would have been the expense of a complete execution of this contract; but the state of the market, in respect to prices, is *now* susceptible of explicit and intelligent proof. And where that is so, it seems to me unsuitable to adopt an arbitrary period; especially as the estimate of damages must in any event be somewhat conjectural."

In a suit for breach of contract for services, wrongfully terminated by the hirer, which suit was commenced before the term of contract was past, Bigelow, C. J., said:

"The rule is perfectly well settled that an action may be maintained to recover damages for the breach of an executory contract, *before the expiration of the time when the stipulations of the respective parties, if there had been no breach, would have been fully performed. If one party is guilty of a clear infraction of the terms of an agreement, which virtually puts an end to it, the other party is not compelled to delay his remedy therefor, because a portion of the contract still remains executory. The breach by one party, by an absolute refusal to fulfill the contract on his part, renders performance by the other party impracticable, and the right to indemnity by an action for damages at once accrues.*"

Mullally v. Austin, 97 Mass., 32.

Such is the rule as to executory contracts for the sale of personal property, to be delivered in futuro in installments, upon breach thereof. *An action may be maintained at once for all damages as to future deliveries without waiting for the end of the term covered by the contract. And a trial may be had and damages be assessed for the whole before the expiration of the term.*

Campbell v. Gates, 10 Pa. St., 483.

Roper v. Johnson, L. R., 8 C. P., 167.

Crabtree v. Messersmith, 19 Iowa, 181.

"*If before the time of performance arrives one party absolutely and definitely repudiates the contract, the other party is entitled* to wait till the time arrives, and then bring his action, or *to treat the contract as broken, and sue for the breach at once. In the latter event he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time.*"

Woods Mayne on Damages (1 Am. Ed.), Sec. 104.

Contracts for support during life furnish many illustrations of the recovery of damages for acts to be performed in futuro. The

right of action necessarily arises at the time of breach, or the person to be supported would be without remedy. And a recovery may be had once for all for a total breach.

Amos v. Oakley, 131 Mass., 413.

And this court has often decided that in contracts of sale to deliver property in future, the measure of damages is the difference between the contract price and the market value *at the time of breach.* See cases cited below on next point.

It results necessarily that if there was a total breach of contract as plaintiffs allege, and as the evidence tended to show, *the plaintiffs might, on the day of the breach, have maintained an action for their full damages, or the value of the whole contract.* This right was then perfect, complete and fully vested.

It results also if such action had been brought, and might have been maintained, and a trial might have been had with a full assessment of damages on that day, *that no subsequent attempt to terminate the contract for non-payment could avail defendant to cut down plaintiffs measure of damages.*

Accordingly, the plaintiffs asked the court to instruct the jury, if they found a total breach of contract as alleged, that the defendant "could not thereafter terminate a contract which it had itself repudiated, and the attempt to terminate on account of non-payment for November coal was wholly nugatory." (Plaintiffs' second instructions, *supra;* Record 108.)

The court refused to so instruct; but on the contrary charged that the defendant might terminate the contract for non-payment—that it had done so—and strictly limited the damages to December 22, the date of attempted termination. This gave the plaintiffs twenty-one days, excluding Sundays, during which they could recover damages, instead of seven months, which the contract had to run when the defendant violated and annulled it. It is submitted that this was patent error.

The magnitude of the error will be seen at once.

The plaintiffs were to pay for the coal, miners' wages, plus 75 cents per ton in December, January, February and March, and plus 62½ cents per ton in April, May and June. (Record 5.) The miners' wages during the first period are shown by Gilfoy to have been 4 cents per bushel, or $1 per ton; and during the second period 3½ cents per bushel, or 87½ cents per ton. (Record 73.) This made the cost of coal to plaintiffs $1.75 and $1.50 per ton during the two pe-

riods respectively. The market price is shown to have been $2.25 and $2 respectively during the same periods (Record 74); leaving a profit of 50 cents per ton during the entire unexpired term of the contract. A car load is shown to have been fourteen tons (Record 75), and plaintiffs were thus entitled to 14x12=168 tons per day, on which their daily profit was $84. The contract had 184 days to run, excluding Sundays, and the total loss which the evidence tended to show on lump coal only was $15,456. But the court by confining the right of recovery to December 22, or twenty-one days, excluding Sundays, limited their possible recovery to $1,764. The right of recovery on nut coal was limited in the same manner, but as the principle is the same it is not necessary to go into that specifically. And this applies to nut coal as to all errors assigned.

2. The court, moreover, as has been pointed out, by instructions 13, 14, 15, 16 and 17, told the jury *it was the duty of Brock & Co. to purchase the coal elsewhere*, and that the measure of damages was "the difference between the cost at which it could have been procured, on the best terms reasonably to be had, and the contract price they had agreed to pay the Fuel Company." By instruction 18, a resort to the market price to determine the damages was only permitted *in case "the coal could not have been procured by Brock & Co., they furnishing the cars for it."*

There are, no doubt, special cases where the wronged party must use his own efforts to prevent enhanced damages from the wrong of which he complains.

But it is believed that there is not a case in the books, where it has been held that in breach of contract by refusal to deliver merchantable property, the vendee must devote his own skill and energies to securing it on the "best terms reasonably to be had," as a condition precedent to resorting to market values to measure his damages.

"Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general, is the difference between the contract price, and the market price of such goods at the time when the contract *is broken*; because the purchaser having the money in his hands, may go into the market and buy. So if a contract to accept and pay for the goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them."

Benjamin on Sales (2 Am. Ed.) Secs. 758 and 870, and numerous authorities there cited.

"*The vendee is entitled to have the thing agreed for at the contract price, and sell it himself at its increased value.*"

Hopkins v. Lee, 6 Wheat., 118.

Very early in the history of this court, it was held in two decisions, where the opinions were by Marshall, C. J.:

That the measure of the damages for the vendee is the difference between the contract price *and the market value at the time of breach.*

Douglas v. McAllister, 3 Cranch, 298.

Shepherd v. Hampton, 3 Wheat., 196.

This rule is followed in

Grand Tower Co. v. Phillips, 23 Wall., 480.

Marsh v. McPherson, 105 U. S., 717.

Roberts v. Benjamin, 124 U. S., 73.

In Hinkley v. Pittsburg Steel Co., 121 U. S., 264, cited *supra*, the contract was to manufacture steel rails expressly for Hinkley, who repudiated the contract; it was insisted in this court "that the plaintiff should have manufactured the rails and tendered them to the defendant, and, upon his refusal to accept and pay for them, should have sold them in the market at Chicago, and held the defendant responsible for the difference between what they would have brought on such sale and the contract price."

But this court said, opinion by Mr. Justice Blatchford:

"The proposition, that after defendant had, for his own purposes, induced the plaintiff to delay the execution of the contract until after the 31st day of August, 1882, *and had thereafter refused to take any rails under the contract, the plaintiff should still have gone on and made the 6,000 tons of rails and sold them on the market for the defendant's account, in order to determine the amount of its recovery against the defendant, can find no countenance from a court of justice.*"

Ib., 274.

No more can the proposition that plaintiffs were under a *duty* to buy coal elsewhere, on the best terms to be had, to protect defendant from its own wrong in arbitrarily and oppressively repudiating its contract, "find countenance from a court of justice." Plaintiffs were entitled to exercise their ingenuity, skill, energies and abilities, to make good bargains in their own affairs and for their own gains. By the rule of law adopted by the court below, the defendant, by a hostile and wrongful act against plaintiffs, converted them into its

hired men, without hire, except wrongs, to protect the interests of the party who was injuring them. Such a rule is a travesty upon justice, and the statement of it furnishes its own refutation.

3. The court below also made the furnishing of cars by Brock & Co. an element in mitigation of damages, (instructions 15, 18, 18, *supra*). This was error if they were not obliged to furnish the cars as a condition precedent.

4. It cannot be said that the jury found that plaintiffs had sustained no damages, and hence they were not prejudiced by the errors complained of. The jury may have based their verdict upon the ruling of the court that furnishing the cars was a condition precedent—finding that Brock & Co. did not supply the cars either before or after the breach complained of; or they may have found that Brock & Co. did not discharge the "duty" imposed by the court, and made no efforts to purchase the coal elsewhere.

There is no view in which the errors pointed out were not prejudicial.

CHAS. A. CLARK,
For Plaintiffs in Error.

IN THE

Supreme Court of the United States,

October Term, 1888.

R. G. BROCK, *et al.*,

Plaintiffs in Error.

VERSUS

THE NORTHWESTERN FUEL CO.,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

C. D. O'BRIEN,

For Defendant in Error.

HIGH & CLYMER, PRINTERS.

IN THE

Supreme Court of the United States,

October Term, 1888.

No. 210.

R. G. Brock, *et al*,

Plaintiffs in Error,

vs.

The Northwestern Fuel Co.,

Defendant in Error.

In Error to the Circuit Court of the United States,
For the Northern District of Iowa.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The defendant in error, the Northwestern Fuel Co., brought its action in the Circuit Court of the United States for the Northern District of Iowa against the

plaintiffs in error, a co-partnership doing business in the State of Iowa, to recover from the plaintiffs $1,300 due to the defendant in error for coal, before that time sold and delivered to the plaintiffs in error by the defendant, in the State of Iowa. (Record, pages 2 and 3.)

The plaintiffs in error, defendants below, joined issue, and admitting the demand of the plaintiff below, defendant in error, set up a counter-claim based on the terms of Exhibit "A", attached to the petition, page 3, Record; and they alleged that by reason of the refusal of the defendant in error to fulfill the stipulations of Exhibit "A", obligatory upon them, that they, plaintiffs in error, were damaged in the sum of $20,000; and issue was joined on this claim by the defendant in error agreeably to the practice of the State of Iowa. Upon the trial of the cause a verdict was rendered by the jury in favor of the defendant in error for the sum claimed in their petition, and necessarily against the claim and demand of the plaintiffs in error. And from a judgment entered upon that verdict the plaintiffs in error have sued out this writ. There are no assignments of error either in the Record or in the Brief for plaintiffs in error, except those found on page 111 of the Record, and these consist of exceptions taken to the instructions given by the Court on the trial of the case. All of the errors claimed by plaintiffs in error, if any, occurred in the charge of the Court, and while the Record is somewhat voluminous, containing, as it does, all the testimony in the case, there really exist but two questions upon which error can be predicated.

ARGUMENT.

The first question that arises is on the construction of the contract, Exhibit "A", pages 3, 4 and 5 of the Record. Stated briefly, the position of the plaintiffs in error upon this contract is, that under its terms defendants below, plaintiffs in error here, were not required to furnish cars upon which the coal they were entitled to under such contract, was to be delivered to them. This position is taken by the plaintiffs in error for the first time in this Court; for in the Court below, both in their pleadings and evidence, they alleged and sought to prove the fact that they did furnish the cars required by the contract to be furnished by them. Counsel for the defendant in error consider it to be their duty here to rescue from the mass of argument, by which they have been obscured, the two questions, and only two, which really exist in this Record; and in doing so respectfully call the attention of the Court to the contract, Exhibit "A," hereinbefore referred to. The parties to that contract, being a coal company upon one side and the plaintiffs in error upon the other, the subject matter of such contract, being the purchase from and delivery by the defendant in error of the coal mined by it at its mine, to the plaintiffs in error, the situation of the parties furnishes a rule of construction of the contract, which, if there is any doubt or could be any doubt, would make the meaning very clear. The obligations upon the part of the defendant in error is clearly stated in the contract (folio 7, page 4, Record): "That, subject to the conditions following, the first party agrees to furnish and deliver to the second party all the lump coal mined by said Coal Co. at their mine now in operation at What Cheer, Iowa"

. . . ."Said coal and all coal herein agreed to be furnished to be loaded at the mines and delivered to said second parties at said mines upon cars to be furnished by said second parties." Such provisions of the contract do not seem to admit of argument as to their meaning.

The other provisions, including the right to terminate the contract have really nothing whatever to say to the case at bar, and need not be further alluded to.

Now, in the answer of the plaintiffs in error, in which the counter-claim is set up (page 9, Record), they plead, first, the contract already alluded to by reference, and allege (folio 20, page 10 of the Record), "These defendants furnished a sufficient number of cars at the mine named in said contract, to receive and ship twelve car-loads of lump coal, as provided by said contract as modified."

Upon the trial of the case the plaintiffs in error submitted testimony and claimed to have proven as a fact that they furnished the cars necessary for the performance of the contract, and now the counsel in this court claims that they were under no obligation to furnish such cars and that a breach of the contract could be shown, although such cars were not furnished by the plaintiffs in error. It seems to be a fair argument to say, that upon submission to the jury their findings should determine the existence or non-existence of these facts. The plaintiffs in error broadly claim that if a breach of the contract had occurred upon the part of the defendant in error after plaintiffs in error were in default as to payments, that for that reason defendant in error could not terminate the contract according to the provisions of the eighth paragraph, page 5 of the

Record. That question is not a material one in this case and could only become material if the jury had found affirmatively that the defendant in error had committed a breach; but this was distinctly negatived by the verdict, so the question became at once utterly immaterial to the further consideration of the case. It is idle to speculate what the relative rights of the parties might have been under different conditions or what their rights would have been had there been mutual breaches of this contract. The jury found under the instructions given them and under the evidence, that there had been no breach whatever upon the part of the defendant in error, but full performance upon its part. They also found that the plaintiffs in error had committed a breach of the contract in not paying for coal which they had already obtained, either according to the terms of the contract or at all. And these findings entirely dispose of the case, and with it the voluminous argument that has been made by counsel for the plaintiffs in error. For the like reason it is unnecessary to follow counsel in his elaborate argument on the question of the measure of damages. Where there are no damages there can be no measure, and it is as idle to discuss what the measure of damages might be in a cause where none are found as it would be to discuss any other possibility not involved in the history of the case.

One commentary upon the entire attitude of the case may be fair: The action was instituted by the defendant in error, plaintiff below, to recover for coal actually delivered to the defendants below under the provisions of this contract. The failure of the defendants below to pay for this coal is conceded and must be conceded to be a breach of their contract

upon their part, for not even the ingenuity of their learned counsel can suggest that under this contract they were to obtain the coal for nothing. It is obvious that no breaches of the contract upon our part could relieve the defendants below from the duty of complying with the terms of this contract so far as it had already been performed, and that in this case meant that they should pay for the coal they had actually received. This they confessedly did not do, and therefore a right to a judgment upon our part must be conceded unless they could show and establish some damages fairly assessible in the case, the amount of which would exceed the amount of our claim. The case stood, therefore, precisely as if the defendants below had brought their action against us affirmatively for the same breaches of contract which they allege in their answer. Tested by all rules known to courts of justice in such a case they would have been compelled to allege and prove the breaches of the contract upon our part of which they complained. In this case they did allege them, but failed to prove them, and there is nothing in the charge of the Court, or the portions of the charge complained of, which in anywise interfered or prevented such proof, if it had existed. To say that the defendants were required to furnish the cars was to say no more than their contract provided, than they themselves alleged, and a fact which they sought to prove. The instructions upon the measure of damages were, in point of law, correct, but are unnecessary to be considered until the time comes for their application. The jury never considered that point, for before they reached it they determined the entire case against the defendants below and that was an end of the matter.

To this subject of the measure of damages the counsel devotes eight pages of a voluminous Brief of 31 pages. It is not considered necessary to pursue that branch of the subject any further.

The tenth position of counsel in his Brief (page 23, Brief for plaintiffs in error) is asserted for the first time in this court. (See Record, pages 107, 108 and 111, containing instructions requested on behalf of the plaintiffs in error and exceptions to the instructions of the Court.)

And the errors assigned should be overruled.

C. D. O'Brien,

Counsel for Defendant in Error.

30-343
130-353

In the Supreme Court of the United States,

IN THE MATTER OF THE APPLICATION OF GON SHAY-EE FOR A WRIT OF HABEAS CORPUS.

1 *To the Honorable Supreme Court of the United States of America:*

Your petitioner, Gon-shay-ee, an Apache Indian of the San Carlos tribe, late residing on the White Mountain Indian Reservation, in the Territory of Arizona, under the care and charge of an Indian Superintendent appointed by the Government of the United States, complaining shows: That he is unlawfully and illegally detained and imprisoned by the United States Marshal of Arizona Territory at the city of Phœnix, in said Territory, in the county jail, in and at said city, as a United States prisoner; that the said illegality consists of this, viz: That your petitioner is detained by virtue of a judgment rendered by, and a warrant of commitment issued by and under the seal of the District Court of the Territory of Arizona, when holding a court with the powers and jurisdiction of Circuit and District Courts of the United States, under and by virtue of the provisions of Section No. 1910, Revised Statutes of the United States, 1878: That by Act of Congress March, 1885, Section 9, 23d Statutes at Large, page 385, the following provision was made regarding criminal cases of Indians:

"That immediately upon and after the date of the passage of this Act, all Indians committing crimes, namely: Murder, manslaughter, rape, assault with an intent to kill, arson, burglary and larceny within any Territory of the

United States, and either within or without the Indian Reservation, shall be subject therefor to the laws of said Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties as are all other persons charged with the commission of the said crimes
2 respectively; and the said courts are hereby given jurisdiction in all such cases, &c., &c."

That the offense charged against your petitioner is murder, proved to have been committed off the Indian reservation and within the county of Pinal; that the trial was held at the city of Phœnix, in the county of Maricopa; that the United States Marshal summoned the grand and trial juries and not the sheriff; that your petitioner is sentenced to imprisonment without the Territory; all of which is contrary to the provisions of the penal code of Arizona in force at the time of trial and sentence of your petitioner, and contrary to the provisions of said Section 9 of Act of 1885.

That the said court had no jurisdiction to hear and determine this case; all of which is shown by copies of the indictment, demurrer, motion in arrest of, and judgment, and commitment, which said copies are hereto attached and made a part of this petition.

Wherefore, your petitioner prays that a writ of *habeas corpus* may be granted, directed to said United States Marshal or persons in charge of your petitioner, commanding him or them to have the body of your petitioner, Gon-shay-ee, before your honorable court, at a time and place to be specified, to do and receive what shall then and there be considered by the court concerning him, together with the time and cause of his detention and said writ; and that your petitioner be restored to liberty.

And your petitioner will ever pray etc., etc.

his
GON x SHAY-EE.
mark.

3 TERRITORY OF ARIZONA, }
County of Maricopa. }

Gon-shay-ee, being duly sworn, says that he is the petitioner named in the foregoing petition; that he has heard read the said petition, and had explained to him fully the contents thereof, and that the same is true of his own knowledge except as to the matters stated therein on information received from his counsel, and as to those matters he believes it to be true.

his
GON x SHAY-EE.
mark.

Subscribed and sworn to before me this 14th day of June, A. D. 1888; J. E. Walker, Clerk of the District Court, Second Judicial District, Territory of Arizona.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, COUNTY OF MARICOPA, TERRITORY OF ARIZONA.

May Term, A. D. 1888, sitting for the trial of all cases arising under the Constitution and laws of the United States, and having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States, at a term thereof held at the city of Phœnix, in the county of Maricopa, in said district and Territory, on th 29th day of May, A. D. one thousand eight hundred and eighty-eight.

THE UNITED STATES OF AMERICA
vs.
GON-SHAY-EE. } Indictment.

SECOND JUDICAL DISTRICT,
Territory of Arizona.

The grand jurors of the United States of America, within and for the Second Judical District, Territory of Arizona, being duly impaneled, sworn and charged to inquire within and for the body of said district, of all offenses committed therein against the United States of America, upon their oath present: That Gon-Shay-ee, an Apache Indian, late of the Second Judicial District, Territory of Arizona, with force and arms, in said district and Territory, on or about the 5th day of June, A. D. one thousand eight hundred and eighty-eight, and be-
5 fore the finding of this indictment: Did then and there feloniously, willfully, deliberately, premeditately and with malice aforethought, make an assault on a human being, to wit, William Deal, in the peace of the

United States then and there being, and with a certain gun, which then and there was loaded with gunpowder and a leaden bullet, and by him, the said Gon-Shay ee, had and held in his hands, he, the said Gon-Shay-ee, did then and there feloniously, willfully, deliberately, premeditately and with malice aforethought, shoot off and discharge at, to, against and upon the said William Deal, thereby and by thus striking the said William Deal with the said leaden bullet, inflicting on and in the body of him, the said William Deal, one mortal wound, of which mortal wound the said William Deal then and there instantly died.

6 And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Gon-Shay-ee, an Apache Indian, in the manner and form aforesaid, and at the time and place aforesaid, did him, the said William Deal, feloniously, willfully, deliberately, premeditately and with malice aforethought, kill and murder, against the peace of the United States and their dignity, and contrary to the form of the statute in such case made and provided.

O. T. ROUSE,
United States Attorney.

7 No. 102. In the District Court, Second Judicial District, Territory of Arizona. United States of America *vs.* Gon-Shay-ee; indictment, a true bill; Sam. F. Webb, foreman of the grand jury. Witnesses before the grand jury, Va-ca-Sem-vigo, Bush-Gah-lah, Suys John Skunlan, Al. Sieber and Antonio Diaz.

Presented to the court in the presence of the grand by their foreman, and filed this 29th day jury of May, 1888; J. E. Walker, clerk.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, TERRITORY OF ARIZONA,

Sitting for the trial of causes under provisions of section 1910, Revised Statutes 1878.

UNITED STATES OF AMERICA, *Plaintiff*,
vs.
GON-SHAY-EE, *Defendant*. } Demurrer.

Now comes the defendant and by his counsel demurs to the indictment found and filed herein, No. 102, upon the following grounds, to wit:

1. That this court has no jurisdiction to hear and determine this case, nor jurisdiction of the person of defendant; that the bill on its face shows a want of jurisdiction; that the defendant is an Indian, charged with killing a white man within this district, second judicial, naming no county or locality.

2. That the indictment is so vague and uncertain as to locality and time, as to deprive the defendant of a substantial right, viz: the defense of Alibi. The whole locality named is "within this district," (second judicial,) which extends over four counties, viz: Gila, Pinal, Yuma and Maricopa, a radius of 300 miles.

That the time of his act is alleged as being committed "on or about the 5th day of June, 1887," which is no time at all.

H. N. ALEXANDER and
L. H. CHALMERS,
Attorneys for Defendant.

[Endorsed:] Filed May 31, 1888; J. E. Walker, clerk.

IN THE DISTRICT COURT, SECOND JUDICIAL DISTRICT OF ARIZONA,

Having and exercising the same jurisdiction under the Constitution and laws of the United States, as is vested in the District and Circuit Courts of the United States.

UNITED STATES OF AMERICA *vs.* GON-SHAY-EE, AN INDIAN. } Motion in arrest of Judgment.

Now comes the defendant, by his counsel, and moves an arrest of judgment; that no judgment be rendered on the verdict in this case, on the following grounds, to wit:

1. That the grand jury which found the indictment, had no legal authority to enquire into the offense charged, for the reason that it was ordered and summoned by a court having no jurisdiction; that the offense charged was not laid at having been committed in the County of Maricopa; that the court which ordered the grand jury summoned, and which tried the case, was sitting with the powers of Circuit and District Courts of the United States under the provisions of section 1910, Revised Statutes of the United States.

2. That the indictment is vague and uncertain as to time and locality, and not drawn in conformity with the requirements of sections 1457, 1458 and 1459, of the penal code of Arizona; that the indictment is so vague and uncertain as to time and place that the defendant was deprived of a substantial right.

Said motion was over-ruled by the court, to which ruling of the court defendant, by his counsel, duly excepts.

WM. W. PORTER,

JUNE 5, 1888. *Judge.*

DISTRICT COURT, SECOND JUDICIAL DISTRICT OF ARIZONA,

Having and exercising the same jurisdiction under the Constitution and laws of the United States, as is vested in the District and Circuit Courts of the United States.

Regular May Term, A. D. 1888.

June 14, A. D. 1888.

Present: Hon. Wm. W. Porter, District Judge.

UNITED STATES OF AMERICA, *Plaintiff*, *vs.* GON-SHAY-EE, *Defendant.*	Convicted of Murder.

The defendant, being present in open court in person, and by his counsel, H. N. Alexander & L. H. Chalmers; the United States Attorneys, O. T. Rouse and Joseph Campbell, present on the part of the United States. And this being the time heretofore fixed for passing judgment on the defendant in this case, the defendant Gon shay-ee was duly informed by the court of the nature of the indictment found against him for the crime of murder committed on or about the 5th day of June, A. D. 1887; of his arraignment, and plea of "not guilty as charged in the indictment;" of the trial, and the verdict of the jury on the 4th day of June, A. D. 1888, guilty of murder as charged in the indictment.

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him; and no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment that, whereas you, Gon-shay-ee, having been duly convicted in

this court of the crime of murder, it is found by the court that you are so guilty of said crime.

11 It is considered and adjudged; and the judgment of the court is that you, Gon-shay-ee, be removed hence to the county jail of Maricopa County, or other place of secure confinement, and there be securely kept until Friday, the 10th day of August, A. D. 1888, and on that day you be taken by the United States Marshal of the Territory of Arizona, to and within the yard of the jail of said Maricopa County, Arizona, and between the hours of nine o'clock a. m. and five o'clock p. m., of that day, by said Marshal you be hanged by the neck till you are dead.

WM. W. PORTER,
District Judge.

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12 TERRITORY OF ARIZONA, } *ss.*
County of Maricopa. }

I, J. E. Walker, clerk of the United States District Court of the Second Judicial District, Territory of Arizona, do hereby certify that the above and foregoing to be a full, true and correct copy of the indictment, demurrer to indictment, motion in arrest of judgment, judgment and commitment in the above-entitled action and of the whole thereof.

Witness my hand and seal of said District Court this the 18th day of June A. D. 1888.

[SEAL.] J. E. WALKER,
Clerk, District Court.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, TERRITORY OF ARIZONA.

UNITED STATES OF AMERICA, *Plaintiff*,
vs.
GON-SHAY-EE, *Defendant*.
} Notice of Appeal.

Now comes the defendant, by his attorneys, and files notice of appeal of the above-entitled cause to the Supreme Court of the Territory of Arizona. The appeal is taken from the judgment entered therein, and from the order over-ruling the defendant's motions in arrest of judgment and for a new trial.

H. N. ALEXANDER and
L. H. CHALMERS,
Attorneys for Defendant.

[Endorsed:] Filed June 14, 1888; J. E. Walker, Clerk.

IN THE DISTRICT COURT OF THE SECOND JUDICAL DISTRICT, TERRITORY OF ARIZONA.

UNITED STATES OF AMERICA, *Plaintiff*, *vs.* GON-SHAY-EE, *Defendant*. } Certificate of Probable Cause.

I, Wm. W. Porter, Judge of the District Court of the Second Judicial District, Territory of Arizona, who presided at the trial of the above-entitled action, hereby certify that there is probable cause for the appeal taken in said case.

WM. W. PORTER,
Judge of said Court.

DATED JUNE 16, 1888.

[Endorsed:] Filed June 16, 1888; J. E. Walker, Clerk.

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14 TERRITORY OF ARIZONA, *County of Maricopa.* } *ss.*

I, J. E. Walker, clerk of the District Court of the Second Judicial District of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true and correct copy of the notice of appeal and certificate of probable cause, in the case of the United States *vs.* Gon-Shay-ee, as appeared of record in my office, and I further certify that a certified copy of the certificate of public cause has been served on the United States Marshal of the Territory of Arizona, and the defendant, Gon-

Shay-ee, is in the custody of the said marshal, confined in the county jail of Maricopa County, Arizona Territory. Judgment still unexecuted.

Witness my hand and the seal of the said court at my office in the city of Phœnix, this 26th day of October, A. D. 1888.

[SEAL.] J. E. WALKER,
Clerk.

In the Supreme Court of the United States,

OCTOBER TERM, 1888.

Nos. ..... Original .....

In the Matter of GON-SHAY-EE,
and
In the Matter of "CAPTAIN JACK."
} Petitions for Writs of *Habeas Corpus*.

MOTION FOR LEAVE TO FILE.

Now come the above-named petitioners and move this Honorable Court for leave to file their petitions herein.

S. F. PHILLIPS,
W. H. LAMAR,
J. G. ZACHRY,
For the Petitioners.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

Nos. 7 and 8, Original. Petition for Writs of Habeas Corpus.

Ex parte GON-SHAY-EE and Ex parte CAPTAIN JACK.

MOTION.

Now comes the above named petitioners, by their attorneys, and move this Honorable Court for leave to proceed herein *informa pauperis*.

And for reason therefor, show unto this Court that the said petitioners are Indians, without money and without means of obtaining the same. That they have made diligent efforts to obtain money for the purpose of conducting these proceedings, but have failed to do so.

SAMUEL F. PHILLIPS,
W. H. LAMAR,
J. G. ZACHRY,
Attorneys for Petitioners.

DISTRICT OF COLUMBIA, }
Washington City, } ss:

William H. Lamar, being first duly sworn, deposes and says that he is an attorney of record in the above-entitled causes; that he has read the foregoing motion, and that the matters and statements therein contained are true, to the best of his knowledge and belief.

WILLIAM H. LAMAR.

Subscribed and sworn to before me this 9th day of March, 1889.

[SEAL.]

FRED. W. PRATT,
Notary Public.

Office Supreme Court U. S.
FILED.
FEB 4 1889
JAMES. H. McKENNEY,
CLERK.

In the Supreme Court of the United States,

OCTOBER TERM, 1888.

In the Matter of "CAPTAIN JACK."

And in the Matter of "GON-SHAY-EE."

BRIEF FOR THE PETITIONERS.

These are applications, severally, by two Apache Indians, for writs of *habeas corpus*, under the same circumstances.

"Captain Jack" is confined in the Ohio State Penitentiary at Columbus, by the sentence of a court of Arizona, under a charge of murder committed in 1888.

Gon-shay-ee is held in prison by the U. S. Marshal for Arizona, under sentence of death for the like crime, given by the same court.

The question raised by each is, as to the jurisdiction of the court.

In each case the petitioner was tried and sentenced by a court that was virtually *a Circuit Court of the United States*, whereas he should have been so tried by *a Territorial Court only*.

The two records agree in describing the court thus: "In the District Court of the Second Judicial District, county of Maricopa, Territory of Arizona, May term, A. D.

1888, sitting for the trial of all cases arising under the Constitution and laws of the United States, and having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States; at a term, &c., &c."

This seems to be enough to show that the court was then sitting in its capacity as a Circuit or District Court of the United States, (Rev. Stat., Sec. 1910,) and not as a court of the Territory.

It is to be added, however, that all other incidents to the record are to the same effect; ex. gr.—the *title* of the indictment,—that of the *grand* jury which returned it,—that of the particular *peace* against which the crime was committed, &c., &c.

As for descriptions of the person charged, and of the person upon whom, and the place where, the crime was committed:

1. In the case of "*Captain Jack*," who is charged jointly with several other persons having Indian names,—no special description is given of the persons charged; whilst the person killed is described as "*An Apache Indian*," and the place of killing as,—"*On the White Mountain Reservation, in the Second Judicial District of the Territory of Arizona*:"

2. In the case of "*Gon-Shay ee*," the party charged, is described as, "*An Apache Indian*," whilst the person killed is not described except by name, "*William Deal;*" and the *place* "*is, in said* [*Second*] *District and Territory.*"

It is admitted (?) that William Deal, was a white man; (see Demurrer, Rec., folio 8.)

1. The case of "Captain Jack," therefore, referring to his petition now presented in connection with the *record* appended thereto, is that of an Indian charged with

murder of another Indian, upon a reservation, within a Territory.

2. That of "Gon-Shay-ee" is a case of an Indian charged with murder of a white man, at some place not specified, except as *within the district* for which the court was sitting.

1. The only statute that can be cited as giving jurisdiction to courts of the United States (whether Federal, State, or Territorial) in cases like that of "Captain Jack," is that of 1885, ch. 341, sec. 9, (23 Stats., 385,) which in the late case of *Kagama*, 118 U. S., 375, received so much attention in this court.

Prior to that statute cases of murder upon such reservations, by one Indian of another of the same tribe, were triable only by the tribe. (Kagama's case, p. 377.)

Section 9 of the above-cited act of 1885 is as follows:

"That immediately upon and after the date of the passage of this act all Indians committing against the person or property of another Indian, or other person, any of the following crimes, namely: Murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, within any Territory of the United States, and either within or without the Indian reservation, shall be subject therefor to the laws of said Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of the said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases, and all such Indians committing any of the above crimes against the person or property of another Indian or other person, within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

In Kagama's case, this court after quoting the above provision in full, went on to say that,

"The above enactment is clearly separable into two distinct definitions of the conditions under which Indians may be punished for the same crimes, as defined by the common law. The first of these is where the offense is committed within the limits of a Territorial Government, whether on or off an Indian reservation. In this class of cases the Indian charged with the crime shall be judged by the laws of the Territory on that subject, and tried by its courts."

It is true, that there, the court was in general considering a case under the *second definition of conditions*, and not under the *first*, which is that involved in the present application; but the court expressly said, (p. 378,) that "the considerations which are necessary to a solution of the problem in regard to the one, must in a large degree affect the other." The language above quoted was, therefore, well considered. It plainly determines that the jurisdiction conferred by the above act of 1885 is conferred upon Territorial courts *as such*, *i. e.*, as sitting under, and to enforce, Territorial laws; and not under, and to enforce, Federal laws. That language is not quoted here as determining a matter *otherwise difficult*, but as furnishing a short answer instead of the more elaborate one which an original discussion of the meaning of the section might involve. The section, indeed, seems both well and clearly drawn, and in its first *definition* answers plainly to what, as above, this court has said.

Therefore, in a case like that of "Captain Jack," no court sitting to enforce Federal laws has jurisdiction.

It follows, that "Captain Jack" is now held by the sentence of a court which had no jurisdiction to pass upon him.

2. The argument in "Gon-Shay-ee's" case is somewhat different. For there the person killed seems to have been a white man; and the place where the act was done had ceased to be *Indian Country*, (Crow-Dog's case, 109 U. S., 556). Therefore section 2145 R. S. which extends the "general law" upon the subject of murder to the "Indian Country," does not apply to the present case.

Nor does the "general law" apply, viz. (R. S., Sec. 5339:) "Every person who commits murder * * in any place or district of country under the exclusive jurisdiction of the United States, * * shall suffer death." "Exclusive jurisdiction" is used there in a sense that excludes a *Territory*. "Indian Country," in one sense, indeed, is within the exclusive jurisdiction of the United States,—inasmuch as whatever *tribal* jurisdiction exists there exists by their sufferance. The case is the same with a *Territory* and its jurisdiction. Therefore, if "Indian Country" was not Country within the exclusive jurisdiction of the United States in matters of crime, but required section 2145 to create jurisdiction thereupon for its courts, so also are Territories. In these, therefore, courts sitting to enforce Federal statutes upon murder, have no jurisdiction under the "general law" above cited. Therefore, crime like that charged upon Gon-shay-ee was not at the time when the above act of 1885 was passed, within the jurisdiction of a Federal court.

We have already seen that the act of 1885 confers no such jurisdiction.

It may be added, *ex abundanti*, that even if the general law in section 5339, above, should be thought to have originally included a Territorial *district* not being *Indian Country*, it seems that the act of 1885 has by implication changed that construction, and turned the crimes therein mentioned over to the *exclusive* jurisdiction of Territorial

courts. For it treats crimes committed by Indians within Territories, whether upon Indians or upon other persons, and whether within or without a reservation, as being upon the same footing; therefore when it appears that in certain cases, like that of *Captain Jack*, the jurisdiction conferred thereby upon Territorial courts, is exclusive. It will be held to be equally so in the other cases mentioned, and not distinguished, therein.

In any case, therefore, the court below was also without jurisdiction over Gon-shay-ee for the matter alleged.

S. F. PHILLIPS,
W. H. LAMAR,
J. G. ZACHRY,
For the Petitioners.

In the Supreme Court of the United States.

IN THE MATTER OF THE APPLICATION OF CAPT. JACK FOR A WRIT OF HABEAS CORPUS.

To the Honorable the Supreme Court of the United States:

1 Your petitioner, Captain Jack, an Apache Indian of the San Carlos tribe, late residing on the White Mountain Indian Reservation, in the Territory of Arizona, under the care and charge of an Indian superintendent, appointed by the Government of the United States, complaining, shows: That he is unlawfully and illegally detained and imprisoned by the warden, superintendent, or persons in charge in the State of Ohio, at the City of Columbus, in the State prison at said city and State as a UnitedStates prisoner; that said illegality consists in this, namely, that your petitioner is detained by virtue of a judgment rendered by, and a warrant of commitment issued by and under the seal of the District of the Second Judicial District of the Territory of Arizona, when holding a court with the powers and jurisdiction of Circuit and District Courts of the United States, under and by virtue of the provisions of Section No. 1910, Revised Statutes of the United States, 1878; that by Act of Congress March, 1885, Section 9, 23d Statutes at Large, page 385, the following provisions were made regarding criminal cases against Indians, viz:

"That immediately upon and after the date of the passage of this act, all Indians committing against the person or property of another Indian, or other person, any of the following crimes, namely: Murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, within any Territory of the United States, and either within or without the Indian reservation, shall be subject to the laws of said Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penaltics as areall other persons charged with the commission of the said crimes respectively; and the said courts are hereby given jurisdiction in all such cases, &c., &c."

That the offense charged against your petitioner is murder, said to have been committed on an Indian reservation and within the county of Gila; that the trial was had in the county of Maricopa; that the United States Marshal summoned the grand and trial jurors, and not the sheriff of Gila County; that your petitioner is sentenced to imprisonment at a place without the Territory, all of which is contrary to the provisions of the penal code of Arizona in force at the time of trial and sentence of your petitioner, and contrary to the provisions of said section 9, act of 1885. That the said court had no jurisdiction to hear and determine this case. All of which is shown by copies of the indictment, demurrer, motion in arrest of, and judgment and commitment, which said copies are hereto attached and made a part of this petition.

Wherefore your petitioner prays that a writ of *habeas corpus* may be granted, directed to said warden or said persons in charge of your petitioner, commanding him or them to have the body of your petitioner, Captain Jack, before your honorable court, at a time and place to be specified, to do and receive what shall then and there be considered by the court concerning him, together with

the time and cause of his detention, and said writ, and that your petitioner be restored to liberty.

And your petitioner will ever pray, &c.

his
CAPTAIN x JACK.
mark.

---

3 TERRITORY OF ARIZONA, }
County of Maricopa. }

Captain Jack, being duly sworn, says that he is the petitioner named in the foregoing petition; that he has heard read the said petition, and had explained to him fully the contents thereof, and that the same is true of his own knowledge, except as to those matters stated therein on information received from his counsel, and as to those matters he believes it to be true.

his
CAPTAIN x JACK.
mark.

Subscribed and sworn to before me this 14th day of June, A. D. 1888.

[SEAL.] J. E. WALKER,
Clerk of the District Court of the Second Judicial District, Territory of Arizona.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, COUNTY ON MARICOPA, TERRITORY OF ARIZONA.

May Term, A. D. 1888, sitting for the trial of all cases arising under the Constitution and laws of the United States, and having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States, at a term thereof held at the city of Phœnix, in the county of Maricopa, in said District and Territory, on the 15th day of May, A. D. one thousand eight hundred and eighty-eight.

THE UNITED STATES OF AMERICA
vs.
CAPTAIN JACK, TZAY-ZIN-TILTH, HAS-TIN-DU-TO-DY, ILTH-KAH, LAH-COHN AND TIL-LY-CHIL-LAY. } Indictment.

SECOND JUDICIAL DISTRICT,
Territory of Arizona.

The grand jurors of the United States of America, within and for the Second Judicial District, Territory of Arizona, being duly impaneled, sworn and charged to inquire within and for the body of said district, of all offenses committed therein against the United States of America, upon their oath present: That Captain Jack, Tzay-zin-tilth, Has-tin-du-to-dy, Ilth-Kah, Lah-Cohn and Til-ly-chil-lay, late of the Second Judicial District, Territory of Arizona, with force and arms, in said district, county and Territory, on or about the 10th day of April,

A. D. one thousand eight hundred and eighty-eight,
5 and before the finding of this indictment: On the White Mountain Indian Reservation, in the Second Judicial District of the Territory of Arizona, did then and there feloniously, willfully, deliberately, premeditately and with malice aforethought, make an assault on a human being, to wit, Noh-chu-bre-con, an Apache Indian, whose true name to the grand jury is unknown, in the peace of the United States then and there being, and with certain guns, which then and there were loaded with gunpowder, and divers leaden bullets, and by them, the said Captain Jack, Tzay-zîn-tilth, Has-tin-du-to-dy, Ilth-Kah, Lah-Cohn and Til-ly-chil-lay, had and held in their hands, they, the said Captain Jack, Tzay-zin-tilth, Has-tin-du-to-dy, Ilth-Kah, Lah-Cohn and Til-ly-chil-lay, did then and there feloniously, willfully, deliberately, premeditately and with malice aforethought, shoot off and discharge at, to, against and upon the said Noh-chu-bre-con, the Apache Indian aforesaid, thereby and by thus striking the said Noh-chu-bre-con, with the said leaden bullets, inflicting on and in the face, breast, abdomen, side, back, legs and body, of him, the said Noh-chu-bre-con, divers mortal wounds, of which said mortal wounds the said Noh-chu-bre-con then and there instantly died.

6 And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Captain Jack, Tzay-zin-tilth, Has-tin-du-to-dy, Ilth-Kah, Lah-Cohn and Til-l-y chil-lay, in the manner and form aforesaid, and at the time and place aforesaid, did him, the said, Noh-chu-bre-con, feloniously kill and murder, against the peace of the United States and their dignity, and contrary to the form of the statute in such case made and provided.

O. T. ROUSE,
United States Attorney.

7 No. 89. In the District Court, Second Judicial District, Territory of Arizona. United States of America *vs.* Captain Jack, Tzay-zin-tilth, Has-tin-du-to-dy, Ilth-Kah, Lah-Cohn and Til-ly-chil-lay; indictment, a true bill; L. H. Orme, foreman of the grand jury. Witnesses before the grand jury, Capt. P. L. Lee, Col. S. Snyder, Cas-Su-do-ra, S. C. No. 1.

Presented to the court in the presence of the grand jury by their foreman, and filed this 17th day of May, 1888; J. E. Walker, clerk.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, COUNTY OF MARICOPA, TERRITORY OF ARIZONA.

THE UNITED STATES OF AMERICA
vs.
CAPTAIN JACK, TZAY-ZIN-TILTH, HAS-TIN-DU-TO-DY, ILTH-KAH, LAH-COHN AND TIL-LY-CHIL-LAY.

Now come the defendants and demur to the indictment herein, and allege as grounds for said demurrer—

1st. That this court has no jurisdiction in the above-entitled case by reason of its not being within the legal jurisdiction of said court.

ALEXANDER & CHALMERS,
Attorneys for Defendants.

[Endorsed:] Filed May 19, 1888; J. E. Walker, Clerk.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, TERRITORY OF ARIZONA,

Having and exercising the same jurisdiction under the Constitution and laws of the United States as is vested in the District and Circuit Courts of the United States.

UNITED STATES OF AMERICA
vs.
CAPTAIN JACK, AN INDIAN. } Motion in arrest of Judgment.

The defendant, present in open court in person, and by his counsel, H. N. Alexander and L. H. Chalmers; O. T. Rouse, U. S. Attorney, Joseph Campbell and A. C. Baker present on the part of the United States.

Now comes the defendant, by his counsel, and moves an arrest of judgment; that no judgment be rendered on the verdict in this case on the following grounds, to wit:

1st. That the grand jury which found the indictment had no legal authority to inquire into the offense charged, for the reason that it was ordered and summoned by a court having no jurisdiction; that the offense charged was not laid as having been committed in the county of Maricopa; that the court which ordered the grand jury summoned, and which tried the case, was sitting with the powers of Circuit and District Courts of the United States under the provisions of Sec. 1910, Revised Statutes of the United States.

2d. That the indictment is vague and uncertain as to time and locality, and not drawn in conformity with the requirements of Secs. 1457, 1458, 1459, of the penal code of Arizona; that the indictment is so vague and uncertain as to time and place that the defendant was deprived of a substantial right.

Said motion was overruled by the court, to which ruling of the court defendant, by his counsel, duly excepts.

WM. W. PORTER,

JUNE 5, 1888. *Judge.*

UNITED STATES OF AMERICA,
DISTRICT COURT, SECOND JUDICIAL DISTRICT OF ARIZONA,

Having and exercising the same jurisdiction under the Constitution and laws of the United States as is vested in the District and Circuit Courts of the United States.

Regular May term, A. D. 1888.

June 14, A. D. 1888.

Present: Hon. Wm. W. Porter, District Judge.

UNITED STATES OF AMERICA, *Plaintiff*, *vs.* CAPTAIN JACK, *Defendant*.	Convicted of Murder.

The defendant, being present in open court in person, and by his counsel, H. N. Alexander and L. H. Chalmers; the United States Attorney, O. T. Rouse, Joseph Campbell and A. C. Baker, present on the part of the United States. And this being the time heretofore fixed for passing judgment on the defendant in this case, the defendant, Captain Jack, was duly informed by the court of the nature of the indictment found against him for the crime of murder, committed on or about the tenth day of April, A. D. 1888; of his arraignment, and plea of "not guilty as charged in the indictment" of the trial, and the verdict of the jury on the twenty-second day of May, A. D. 1888, guilty of murder, as charged in the indictment.

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him; and no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment: That, whereas you, Captain Jack, having been duly convicted in this court of the crime of murder, it is found by the court that you are so guilty of said crime.

It is therefore ordered, adjudged and decreed, and the judgment and sentence of the court is, that you, Captain Jack, be punished by imprisonment in the Ohio State Penitentiary, at Columbus, Ohio, at hard labor, for a term of thirty years, to date from June 14th, A. D. 1888.

The defendant was then remanded to the custody of the Marshal of said Arizona Territory, to be by him delivered into the custody of the proper officers of said Ohio State Penitentiary, at Columbus, Ohio.

And it is further ordered, That a certified copy of this judgment shall be a sufficient warrant for the said marshal to take, keep and safely deliver the said Captain Jack into the custody of the proper officers of said Ohio State Penitentiary, at Columbus, Ohio, and a sufficient warrant for the officers of said Ohio State Penitentiary, at Columbus, Ohio, to keep and imprison the said Captain Jack.

WM. W. PORTER,
District Judge.

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11 TERRITORY OF ARIZONA, } ss:
County of Maricopa. }

I, J. E. Walker, clerk of the U. S. District court of the Second Judicial District, Territory of Arizona, do hereby certify that the above and foregoing to be a full, true and correct copy of the indictment, demurrer to indictment, motion in arrest of judgment, judgment and commitment in the above-entitled action and of the whole thereof.

Witness my hand and seal of said District court this the 18th day of June, A. D. 1888.

[SEAL.] J. E. WALKER,
Clerk, District Court.

Office Supreme Court U. S.
FILED.
MAR 14 1889
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

IN THE MATTER OF CAPTAIN JACK
and
IN THE MATTER OF GON-SHAY-EE.
} Petitions for habeas corpus.

BRIEF FOR THE RESPONDENTS.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

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BRIEF FOR THE RESPONDENTS.

Both the petitioners in the above-stated cases were tried and sentenced by a Territorial court of the Territory of Arizona sitting as a court of the United States. It is contended by the petitioners that the United States court had no jurisdiction, and that by the ninth section of the act of Congress of the 3d of March, 1885, the crime was cognizable only in the court sitting as a Territorial court. The crime charged against Captain Jack is alleged to have been committed within an Indian reservation; that of Gon-shay-ee outside of the reservation. Both crimes are charged to have been committed within the district for which the court sat as a United States court. The charge against Captain Jack is the murder of an Apache Indian; that against Gon-shay-ee is the murder of a white man.

The statutes which (prior to the act of 1885) relate to the subject-matter are—

Section 1910 of the Revised Statutes, which is:

> Each of the district courts in the Territories mentioned in the preceding section shall have and exercise the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States; and the first six days of every term of the respective district courts, or so much thereof as is necessary, shall be appropriated to the trial of causes arising under such Constitution and laws; but writs of error and appeals in all such cases may be had to the supreme court of each Territory, as in other cases.

Section 2145, which is:

> Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

Section 2146, which is:

> The preceding section shall not be construed to extend to [crimes committed by one Indian against the person or property of another Indian, nor to] any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Section 5339, which is:

> Every person who commits murder—
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> First. Within any fort, arsenal, dock-yard, magazine, or in any other place or district of country

under the exclusive jurisdiction of the United States;

Second. Or upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State;

Third. Or who upon any such waters maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death.

Section 5391, which is:

If any offense be committed in any place which has been or may hereafter be ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the State in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any court of the United States.

This last section, although it is only applicable to States, may be considered as illustrative of the principle that the extension of the laws of a Territory to the trial for and punishment of a crime does not necessarily transfer the jurisdiction from the courts of the United States to the State or Territorial court to try and punish according to their laws.

"Indian country" was defined by the act of the 30th of June, 1834 (4 U. S. Statutes, 729), to be:

> That all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the Territory of Arkansas, and also that part of the United States east of the Mississippi River, and not within any State to which the Indian title has not been extinguished, for the purpose of this act be taken and deemed to be the Indian country.

In the case of *ex parte Crow Dog* (109 U. S., 561) this court ruled with reference to that definition:

> In our opinion that definition now applies to all the country to which the Indian title has not been extinguished, within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes, excluding, however, any territory embraced within the exterior geographical limits of a State, not excepted from its jurisdiction by treaty or by statute, at the time of its admission into the Union, but saving, even in respect to territory not thus excepted, and actually in the exclusive occupancy of Indians, the authority of Congress over it under the constitutional power to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it.

The phrase "exclusive jurisdiction of the United States" is first used in the seventeenth clause of the eighth section of the first article of the Constitution, with reference to the District of Columbia, forts, arsenals, etc.

In the case of *National Bank* vs. *County of Yankton* (101 U. S., 133), this court ruled with reference to the power of Congress over the Territories, as follows:

> The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the Territorial authorities. But Congress is supreme, and, for the purposes of this department of its governmental authority, has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibition of the Constitution. * * *
>
> In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments. It may do for the Territories what the people under the Constitution of the United States may do for the States.

The fact, that Congress has carved out of the general jurisdiction, certain powers, and has conferred them upon the Territorial governments, is but a form which has been adopted to exercise the exclusive jurisdiction of the United States.

Section 5339 therefore seems to apply to the offense of murder in the Territories, unless otherwise provided for by law.

The ninth section of the act of the 3d of March, 1885 (23 U. S. Stats., 385), is:

> That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes respectively; and the said courts are hereby given jurisdiction in all such cases, and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

The true interpretation of this statute is believed to be decisive of these cases. So much of it as is applicable to Indian reservations within the States has been authoritatively ruled upon, and the full section thoroughly discussed in the case of *United States* vs. *Kagama* (108 U. S., 377).

G. A. JENKS,
Solicitor-General.